Docket for 04-1527

(27)

No. 04-1527
Title: S.D. Warren Company, Petitioner
v.
Maine Board of Environmental Protection
Docketed: May 16, 2005
Lower Ct: Supreme Judicial Court of Maine
Case Nos.: (Cum-04-314)
Decision Date: February 15, 2005
Questions Presented

Date	Proceedings and Orders
May 12 2005	Petition for a writ of certiorari filed. (Response due June 15, 2005)
Jun 15 2005	Brief of respondent Maine Department Environmental Protection in opposition filed.
Jun 15 2005	Brief amicus curiae of New England Legal Foundation filed.
Jun 15 2005	Brief of respondents-Intervenors American Rivers and Friends of Presumpscot River in opposition filed.
Jun 29 2005	DISTRIBUTED for Conference of September 26, 2005.
Oct 3 2005	DISTRIBUTED for Conference of October 7, 2005.
Oct 11 2005	Petition GRANTED limited to Question 1 presented by the petition.
Nov 17 2005	Consent to the filing of amicus briefs in support of either party received from counsel for respondents American Rivers, et al.
Nov 22 2005	Brief amicus curiae of Salt River Project Agricultural Improvement and Power District filed.
Nov 23 2005	Brief amicus curiae of Augusta, Georgia filed.
Nov 23 2005	Brief amicus curiae of Western Urban Water Coalition filed.
Nov 23 2005	Brief amici curiae of National Association of Home Builders, et al. filed.
Nov 25 2005	Joint appendix filed.
Nov 25 2005	Brief of petitioner S.D. Warren Company filed.
Nov 25 2005	Brief amici curiae of Edison Electric Institute, et al. filed.
Nov 25 2005	Brief amicus curiae of New England Legal Foundation filed.
Nov 28 2005	Consent to the filing of amicus briefs in suport of either party received by counsel for the respondent.
Nov 30 2005	SET FOR ARGUMENT on Tuesday, February 21, 2006.
Dec 9 2005	CIRCULATED.
Dec 12 2005	Extension of time within which to file respondents' briefs on the merits to and including January 6, 2006.
Jan 5 2006	Brief amici curiae of Hoopa Valley Tribe, et al. filed. (Distributed)
Jan 6 2006	Brief amicus curiae of United States filed. (Distributed)
Jan 6 2006	Brief amicus curiae of Friends of the Everglades filed. (Distributed)
Jan 6 2006	Brief of respondent Maine Board of Environmental Protection filed. (Distributed)
Jan 6 2006	Brief of respondents American Rivers and Friends of the Presumpscot River filed. (Distributed)
Jan 6 2006	Brief amicus curiae of James M. Jeffords filed. (Distributed)
Jan 6 2006	Brief amici curiae of Former Assistant Administrators of the United States Environmental

	Protection Agency, J. Charles Fox, et al. filed. (Distributed)
Jan 6 2006	Brief amicus curiae of Micosukee Tribe of Indians of Florida filed. (Distributed)
Jan 6 2006	Brief amici curiae of New York, et al. filed. (Distributed)
Jan 6 2006	Brief amicus curiae of Water Quality and Riverine Scientists filed. (Distributed)
Jan 6 2006	Brief amici curiae of Trout Unlimited, et al. filed. (Distributed)
Jan 6 2006	Brief amici curiae of National Wildlife Federation, et al. filed. (Distributed)
Jan 11 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 11 2006	Record received from Supreme Judicial Court of Maine. (3 boxes).
Jan 23 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 10 2006	Reply of petitioner S.D. Warren Company filed. (Distributed)
Feb 21 2006	Argued. For petitioner: William J. Kayatta, Jr., Portland, Me. For respondent: G. Steven Rowe, Attorney General, Augusta, Me.; and Jeffrey P. Minear, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for the United States, as amicus curiae.)

Supreme Court, U.S.
FILED
MAY 12 2005
OFFICE OF THE CLERK

No. 04-1527

In The

Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

PETITION FOR A WRIT OF CERTIORARI

MATTHEW D. MANAHAN
(Counsel of Record)
NICHOLAS D. LIVESAY
PIERCE ATWOOD LLP
One Monument Square
Portland, Maine 04101
(207) 791-1100

Counsel for Petitioner
S.D. Warren Company

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Does the mere flow of water through an existing dam constitute a "discharge" under Section 401, 33 U.S.C. § 1341, of the Clean Water Act, despite this Court's holding last year in *Miccosukee* that a discharge requires the addition of water from a distinct body of water?

2. Does the State of Maine's expansive application of Section 401 conflict with the Federal Energy Regulatory Commission's comprehensive licensing authority over hydroelectric generating projects under the Federal Power Act, 16 U.S.C. §§ 791a *et seq.*?

CORPORATE DISCLOSURE STATEMENT AND PARTIES BELOW

The parties to the appeal before the Maine Supreme Judicial Court ("SJC") were Petitioner S.D. Warren Company ("Warren"), Respondent Maine Department of Environmental Protection ("DEP"), and Intervenors American Rivers and Friends of the Presumpscot River.

Warren is a direct wholly-owned subsidiary of SDW Holdings Corporation (a Delaware corporation), which is a wholly-owned subsidiary of Sappi Papier Holding GmbH (Austria), which is a wholly-owned subsidiary of Sappi Holding GmbH (Austria), which is a wholly-owned subsidiary of Sappi Limited. Therefore, S.D. Warren Company is an indirect wholly-owed subsidiary of Sappi Limited. Sappi Limited is a South African corporation that is publicly traded on the Johannesberg, New York, Frankfurt, and London stock exchanges, and has no publicly traded subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
CORPORATE DISCLOSURE STATEMENT AND PARTIES BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
I. The operative facts are undisputed: Warren owns and operates existing run-of-river hydropower projects and applied for water quality certification, under protest, for the relicensing by FERC of those projects	2
II. Agency Action: The Maine DEP requires Warren to obtain water quality certification and assumes a primary role in the relicensing and ongoing regulation of the Projects	3
III. Judicial Review	4
REASONS FOR GRANTING THE WRIT	6
I. The Maine SJC's decision in *Warren* conflicts with this Court's decision in *Miccosukee*	9
A. This Court's Statements on What Constitutes an "Addition" – The Mixing of Water From Meaningfully Distinct Water Bodies	10

TABLE OF CONTENTS – Continued

Page

B. The reasoning in *Miccosukee* applies to CWA Section 401 10

C. The Maine SJC in *Warren* applied the wrong legal test and, as a result, reached the wrong conclusion 11

II. What constitutes an "addition" under the CWA is an important question of federal law warranting clarification by this Court; without clarification confusion among the courts and regulatory agencies will persist..... 13

A. An Overview of Pre-*Miccosukee* Case Law.. 13

B. The Post-*Miccosukee* Confusion 16

III. The State of Maine's expansive application of Section 401 conflicts with FERC's comprehensive licensing authority over hydroelectric generating projects under the FPA 17

A. The SJC impermissibly broadened the scope of Section 401 18

1. Section 401 applies only if there may be a discharge of a pollutant..... 19

2. Continued operation of the Projects will not "result in" a discharge..... 21

3. Section 401 does not authorize states to include reopeners 21

B. The *Warren* court's expansive interpretation of the scope of CWA Section 401 and the powers it grants to the states is inconsistent with the FPA 23

TABLE OF CONTENTS – Continued

Page

1. The FPA's Grant of Power to FERC..... 23

2. The Interplay of the CWA and the FPA .. 25

CONCLUSION 27

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alabama Rivers Alliance v. FERC, 325 F.3d 290 (D.C. Cir. 2003) 15, 16

American Rivers, Inc. v. FERC, 129 F.3d 99 (2d Cir. 1997) 9, 25

California v. FERC, 495 U.S. 490 (1990) 25

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2nd Cir. 2001) 10, 14

Dubois v. Department of Agriculture, 102 F.3d 1273 (1st Cir. 1996) 14

First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946) 24, 25

National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988) 14

National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 13, 14

North Carolina v. FERC, 112 F.3d 1175 (D.C. Cir. 1997) 5, 11, 15, 20, 21

PUD #1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994) 20

South Florida Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95 (2004) ..... *passim*

STATE CASES

Bangor Hydro-Electric Co. v. Board of Environmental Protection, 595 A.2d 438 (Me. 1991) 26

de Rham v. Diamond, 295 N.E.2d 763 (N.Y. 1973) 26

TABLE OF AUTHORITIES – Continued

Page

Niagara Mohawk Power Corp. v. New York State Dept. of Envtl. Conservation, 624 N.E.2d 146 (N.Y. 1993) 18, 26

Power Auth. of New York v. Williams, 457 N.E.2d 726 (N.Y. 1984) 26

S.D. Warren Co. v. Board of Environmental Protection, 2005 ME 27 ..... *passim*

S.D. Warren Co. v. Maine Department of Environmental Protection, No. AP-03-70 (Me. Super. Ct., Cum. Cty., May 4, 2004) 1

AGENCY DECISIONS

City of Augusta, Georgia, 109 F.E.R.C. ¶ 61,210 (2004) 16

FPL Energy Maine Hydro LLC, 111 F.E.R.C. ¶ 61,104 (2005) 16

Great Northern Paper, Inc., 77 F.E.R.C. ¶ 61,066 (1996) 22

FEDERAL STATUTES

16 U.S.C. §§ 791a *et seq.* 2, 9

16 U.S.C. § 797(e) 23

16 U.S.C. § 799 ..... 2, 26

16 U.S.C. § 803(a) 24

16 U.S.C. § 803(j) 25

16 U.S.C. § 821 ..... 2, 23, 24

28 U.S.C. § 1257(a) 1

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. §§ 1251 *et seq*..... 2
33 U.S.C. § 1251(a)..... 19
33 U.S.C. § 1252(a)..... 19
33 U.S.C. § 1311(a)..... 19
33 U.S.C. § 1321(a)(1)..... 20
33 U.S.C. § 1322(a)(9)..... 20
33 U.S.C. § 1341..... 2, 5
33 U.S.C. § 1341(a)(1)..... 6, 11, 20
33 U.S.C. § 1341(a)(3)..... 22
33 U.S.C. § 1341(a)(5)..... 22
33 U.S.C. § 1341(d)..... 22
33 U.S.C. § 1342..... 2, 7
33 U.S.C. § 1342(a)(1)..... 10
33 U.S.C. § 1362(7)..... 5
33 U.S.C. § 1362(12)..... 5, 11
33 U.S.C. § 1362(14)..... 20
33 U.S.C. § 1362(16)..... 4, 11, 20

STATE STATUTES

ME. REV. STAT. ANN. tit. 5, § 11001(1)..... 1
ME. REV. STAT. ANN. tit. 5, § 11008(1)..... 1

MISCELLANEOUS

S. Ct. Rule 10(c)..... 9

PETITION FOR WRIT OF CERTIORARI

S.D. Warren Company petitions for a writ of certiorari to review the decision of the SJC upholding the DEP's decision to require Warren to obtain state water quality certification for the relicensing by the Federal Energy Regulatory Commission ("FERC") of five hydroelectric dam projects, and allowing the DEP to subvert FERC's licensing authority.

OPINIONS BELOW

The two DEP orders are unreported but are reprinted in the Appendix ("App."), the DEP Commissioner's initial certification order (the "Certification") at App. A-74 and the Board of Environmental Protection's ("BEP's") order on appeal of the Certification at App. A-35. The Maine Superior Court's opinion, *S.D. Warren Co. v. Maine Department of Environmental Protection*, No. AP-03-70 (Me. Super. Ct., Cum. Cty., May 4, 2004), is unreported but is reprinted in the Appendix at A-19. The SJC's opinion upholding the Superior Court's order, entered February 15, 2005, is reported at *S.D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27, and is reprinted in the Appendix at App. A-1.

JURISDICTION

The SJC exercised jurisdiction over Warren's appeal pursuant to ME. REV. STAT. ANN. tit. 5, §§ 11001(1) and 11008(1). The order of the SJC was entered on February 15, 2005. This Court's jurisdiction rests upon 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS

At issue in this case is the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq*. (the "Clean Water Act" or "CWA"), in particular Section 401, 33 U.S.C. § 1341, and the Federal Power Act ("FPA"), 16 U.S.C. §§ 791a *et seq*. The Appendix contains the pertinent text from 33 U.S.C. §§ 1341, 1342, and 1362 and 16 U.S.C. §§ 797, 799, 803, and 821.

STATEMENT OF THE CASE

I. The operative facts are undisputed: Warren owns and operates existing run-of-river hydropower projects and applied for water quality certification, under protest, for the relicensing by FERC of those projects.

Warren owns and operates five hydroelectric generating dam projects (the "Projects") located on the Presumpscot River in Maine. *Warren*, 2005 ME, ¶ 2, App. at A-2, *Warren*, AP-03-70 at 1, App. at A-19. All five of the Projects were constructed in the early 1900s. *Warren*, 2005 ME, ¶ 3, App. at A-2. The Projects provide electricity to Warren's Westbrook paper mill. *Warren*, 2005 ME, ¶ 1, App. at A-1.

The Projects are operated in run-of-river mode, meaning that outflow from each dam is equal to inflow during normal operating conditions. App. at A-120. The Projects do not remove water from the river, and they do not introduce any substance, pollutant or otherwise, into the water. *See* App. at A-87 to A-88, A-106 to A-110, A-120 to A-121.

FERC licenses for the Projects expired on January 26, 2001. As part of the FERC relicensing process, on January 14, 1999, Warren submitted applications to the DEP for CWA Section 401 certifications. *Warren*, 2005 ME, ¶ 3, App. at A-2. In submitting these applications – which the DEP instructed Warren to file – Warren stated that water quality certification was not in fact needed, and expressly reserved its rights to make this argument. SJC Appendix ("SJC App.") tab 11 at 133.

II. Agency Action: The Maine DEP requires Warren to obtain water quality certification and assumes a primary role in the relicensing and ongoing regulation of the Projects.

In April 2003, the DEP Commissioner issued the Certification, holding that, pursuant to Section 401 of the CWA, water quality certification is required for the FERC relicensing of the Projects. The Certification contains a host of conditions relating to water levels and flows, impoundment drawdowns and refill procedures, eel and fish passage, reaeration measures, and recreational facilities. Perhaps most significantly, the Certification also includes "reopeners," *i.e.*, conditions that allow the DEP to reopen the Certification by imposing additional or different requirements in the future. App. at A-123, A-125 to A-128, A-134 to A-137, A-139.

Warren appealed the Certification to the BEP. *Warren*, 2005 ME, ¶ 3, App. at A-2. The BEP affirmed after *de novo* review. App. at A-37 to A-38, A-73.

III. Judicial Review

Warren timely filed a petition for review in the Maine Superior Court. Warren argued, *inter alia*, that water flowing through a dam – where nothing is added to the water either by the dam or from outside the water body – does not constitute a "discharge into" the water that triggers Section 401 certification requirements. Warren also argued that even if water passing through a dam qualified as a discharge, only the discharge of a "pollutant" requires certification. Further, Warren argued that even if water without a pollutant qualified as a discharge, relicensing the Projects would not "result in" a discharge because the relicensing of the existing Projects would simply allow the preexisting discharge (assuming a discharge existed) to continue. Finally, Warren challenged the "reopener" provisions of the Certification.

The Superior Court denied Warren's appeal. Warren appealed to the SJC, which issued its decision denying Warren's appeal on February 15, 2005.

The SJC, addressing the issue of whether water flowing through a dam constitutes a "discharge" under Section 401 of the CWA, created an entirely new legal test and concluded that, based on that test, all water passing through a dam qualifies as a discharge. *Warren*, 2005 ME, ¶¶ 12-13, App. at A-7 to A-8.

The SJC properly began its analysis by looking to the statutory language. The SJC stated:

> The term discharge is not expressly defined anywhere in the CWA, however, section 502(16), 33 U.S.C.A. § 1362(16) (West 2001), provides that, "[t]he term 'discharge when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." This statement of inclusion provides "the nearest evidence we have of definitional intent by Congress."

Id. ¶ 10, App. at A-6 (citing *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997)). The definition of the phrases "discharge of a pollutant" and "discharge of pollutants" both mean:

> (A) any *addition* of any pollutant to navigable waters from any point source,
>
> (B) any *addition* of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1362(12) (emphasis added). The SJC thus reasoned that "[a]n 'addition' is the fundamental characteristic of any discharge." *Warren*, 2005 ME, ¶ 11, App. at A-6.

In assessing whether water flowing through a dam constitutes an "addition" the SJC then created a new legal test, focusing on whether the water is subject to "private control." *Id.* ¶¶ 12-13, App. at A-7 to A-8. The SJC reasoned that the moment water passes through a dam it is subject to "private control" and thus temporarily loses its status as waters of the United States.[1] As a result of this temporary change in status, the SJC reasoned that when water "exiting" a dam "reconnects" with water that moments before followed the same path, but now once again is classified as "waters of the United States," this "reintroduction" of different water (*i.e.*, non-waters of the United

[1] Section 401 of the CWA, 33 U.S.C. § 1341, applies to discharges into navigable waters. Navigable waters are defined as the "waters of the United States" at Section 502(7), 33 U.S.C. § 1362(7).

States) constitutes an "addition." Such an "addition" of clean water, the SJC concluded, is a "discharge" requiring water quality certification pursuant to Section 401. *Id.*

The SJC also rejected Warren's argument that Section 401 requires state certification only for discharges of "pollutants." *Id.* ¶¶ 14-16, App. at A-8 to A-10. The SJC reasoned that the word "discharge" has been interpreted broadly. *Id.* ¶ 14, App. at A-8. Such an interpretation, said the SJC, encompasses the discharge of anything – even clean water – not just pollutants.

The SJC did not address Warren's argument that the statutory language of Section 401 establishes that certification is required only for any discharge that may "result in" a discharge into navigable waters, but that relicensing the Projects merely authorized the continued presence of a discharge, assuming one exists. *See* 33 U.S.C. § 1341(a)(1).

Finally, the SJC considered and rejected Warren's argument that the DEP exceeded its authority by including reopener conditions in the Certification. After acknowledging that forcing FERC either to accept these conditions or to deny the license altogether could produce "harsh results," the SJC nonetheless concluded that nothing in federal law prohibits reopeners. *Warren*, 2005 ME, ¶ 26, App. at A-14 to A-15.

REASONS FOR GRANTING THE WRIT

Dams such as those at issue here should not be subject to the certification requirements of the CWA because they add nothing to the water. The contrary holding by the Maine SJC conflicts with established

precedent of this Court and with the approach of many other courts, defies common sense, is an unsupportable interpretation of the statute, and further confuses the law in an area that urgently needs clarification by this Court. Further, the SJC's interpretation usurps FERC's exclusive regulatory authority over hydropower projects like those in this case, thus undermining federal control over this vitally important national energy sector. Warren respectfully petitions this Court to correct the SJC and add clarity to this important area of law. Specifically, the Court should grant the writ for three reasons.

1. **The Maine SJC's decision in *Warren* conflicts with this Court's decision in *Miccosukee*.** First, the issue of what constitutes an "addition" and thus a "discharge" under the CWA is an important question of federal law, which the SJC answered in a way that directly conflicts with this Court's decision in *South Florida Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004). *See* S. Ct. Rule 10(c). The importance of this question is difficult to overstate because the interpretation of the word "discharge" determines the scope of the CWA – the primary federal statute designed to regulate activities that may impact water quality throughout the United States. Not only does the Section 401 certification requirement hinge on whether there is a "discharge," but so too does the need for a Section 402 permit issued as part of the CWA's National Pollutant Discharge Elimination System ("NPDES").[2] It was in this latter context that this Court, in *Miccosukee*, addressed the question of what constitutes an "addition." As discussed below, the

[2] Section 402, 33 U.S.C. § 1342, establishes the NPDES program and authorizes the U.S. Environmental Protection Agency to require a permit for the "discharge" of any pollutant into navigable waters.

SJC's interpretation in *Warren* of the words "addition" and "discharge," and its application of those words to Section 401, directly contradicts this Court's decision in *Miccosukee*.

2. **What constitutes an "addition" under the CWA is an important question of federal law warranting clarification by this Court; without clarification confusion among the courts and regulatory agencies will persist.** Second, a grant of *certiorari* will give the Court the opportunity to settle the confusion among the circuit and state courts, and federal and state agencies, about what constitutes an "addition" triggering Section 401 certification requirements. How to interpret the Clean Water Act is an important federal question worthy of this Court's attention even if the direct conflict noted in the preceding paragraph did not exist. *See* S. Ct. Rule 10(c). Prior to *Miccosukee*, several of the U.S. Circuit Courts of Appeals had addressed the issue of when the mixing of water is considered an "addition" under the CWA. As discussed below, the decisions reached by the different circuits were inconsistent. While *Miccosukee* should have settled this issue, the Maine SJC's decision in *Warren* illustrates that some courts do not believe *Miccosukee*'s reasoning applies in the context of Section 401. This Court should eliminate this misunderstanding by clarifying that the test in *Miccosukee* for determining whether an "addition" occurs applies to both sections 402 and 401.

3. **The State of Maine's expansive application of Section 401 conflicts with FERC's comprehensive licensing authority over hydroelectric generating projects under the FPA.** Third, this case demands the Court's intervention because the SJC's opinion in *Warren* conflicts with the comprehensive jurisdiction of FERC in hydropower licensing proceedings. The State of Maine is using its CWA certification

authority effectively to displace FERC's authority under the Federal Power Act, 16 U.S.C. §§ 791a *et seq.* ("FPA"). Pursuant to *American Rivers, Inc. v. FERC*, 129 F.3d 99 (2d Cir. 1997), FERC has no authority to reject conditions imposed by states in their certifications; such conditions may only be rejected by state courts in an appeal of the certifications through the state's appeal process. Because the Maine courts are complicit in the State's efforts to use its Section 401 authority to displace FERC's FPA authority, only this Court can correct the State of Maine's power grab. S. Ct. Rule 10(c). The SJC's expansive interpretation of a state's authority under Section 401 is directly at odds with the primary authority Congress, in the FPA, granted to FERC to license hydropower projects. Warren therefore asks this Court to clarify the relationship between FERC's role and the states' role in the licensing of hydropower projects. *See id.*

I. The Maine SJC's decision in *Warren* conflicts with this Court's decision in *Miccosukee*.

The SJC's reasoning that a dam exercises private control over water, that the water passing through a dam thus temporarily loses its status as "waters of the United States," and that reintroduction of this water (now allegedly non-waters of the United States) constitutes an "addition," is directly contrary to this Court's decision in *Miccosukee*. The appropriate test, as articulated in *Miccosukee*, is based not on private control but on whether the waters being mixed are from "meaningfully distinct water bodies." *See Miccosukee*, 541 U.S. at 112.

A. This Court's Statements on What Constitutes an "Addition" – The Mixing of Water From Meaningfully Distinct Water Bodies.

Last year in *Miccosukee*, this Court addressed the question of what constitutes an "addition" (and thus a "discharge") under CWA Section 402. In *Miccosukee*, as part of the Central and South Florida Flood Control Project, water was pumped from a canal to a wetland area sixty feet away. To determine whether this pumping of water into the wetland was an "addition" this Court stated that the dispositive question was whether the canal and wetland are "meaningfully distinct water bodies." *Id.* If they are, the pumping is an "addition." If they are not, the pumping of the water from one location to another did not "add" anything to the navigable water: "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* at 110 (quoting *Catskill Mountains*, 273 F.3d at 492).

Thus, for there to be an "addition" to the waters of the United States, something must be added into the water from outside the water. Taking water out of the water body and then redepositing that same water back into the water body is not an "addition."

B. The reasoning in *Miccosukee* applies to CWA Section 401.

CWA Section 402 authorizes the U.S. Environmental Protection Agency ("EPA") or a delegated state to "issue a permit for the discharge of any pollutant." 33 U.S.C. § 1342(a)(1). CWA Section 401 requires state water quality certification for a federally-licensed activity that may

result in a "discharge." *Id.* § 1341(a)(1). The word "discharge," as used in both sections 401 and 402, includes the "discharge of a pollutant." *Id.* § 1362(16). As a result, the word "discharge," used in Section 401, must be read consistently with the term "discharge of a pollutant," used in Section 402. *North Carolina*, 112 F.3d at 1187.

The CWA defines "discharge of a pollutant" to mean "any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). Thus, the meaning of "addition" is fundamental to interpreting both sections 401 and 402. *See North Carolina*, 112 F.3d at 1187 (interpreting Section 401 and stating, "the nearest evidence we have of definitional intent by Congress reflects, as might be expected, that the word 'discharge' contemplates the addition . . . of a substance or substances"). Because the same key definitional phrase is being interpreted, both Section 401 and Section 402 case law are directly relevant to the issue of what qualifies as an "addition."

C. The Maine SJC in *Warren* applied the wrong legal test and, as a result, reached the wrong conclusion.

Although the SJC in *Warren* acknowledged that Section 401 applies only when there has been an "addition" to navigable waters, the SJC improperly focused its analysis on whether water flowing through a dam is "privately controlled," making the asserted change in "control" the dispositive issue. *Id.* ¶¶ 12-13, App. at A-7 to A-8. This Court in *Miccosukee*, however, established that control of the water is not dispositive in determining whether there has been an addition.

As noted above, the question in *Miccosukee* was whether water pumped from a canal into a nearby wetland constituted an "addition." Although pumping water is an example of private control, this Court stated that the dispositive issue was whether the canal and wetland are "meaningfully distinct water bodies," not whether someone or something has exercised private control over the water. *Miccosukee*, 541 U.S. at 112. If water from distinct water bodies is combined, the introduction of this foreign water into the receiving water is an *addition* of something new from the outside world. If the water being mixed is not from two distinct water bodies, an addition does not occur.

Applying this reasoning from *Miccosukee*, the water flowing through Warren's Projects does not constitute an addition. First, it is undisputed that the water above, below, and momentarily within each dam is all part of the same body of water – the Presumpscot River. Second, it is undisputed that the dams do not introduce any pollutant, such as oil, grease, or heat, into the water. Just as lifting a ladle of soup from a pot and pouring the ladle's contents back into the pot does not constitute an addition, water flowing through Warren's dams similarly adds nothing new to the Presumpscot River. *See id.* at 110. Absent such an addition, the CWA does not require Section 401 certification.

The test the SJC applied in *Warren* was the wrong test and, for that reason, led to the opposite conclusion. The *Warren* court's decision directly conflicts with *Miccosukee*, and should be reversed.

II. What constitutes an "addition" under the CWA is an important question of federal law warranting clarification by this Court; without clarification confusion among the courts and regulatory agencies will persist.

Prior to *Miccosukee*, the U.S. Circuit Courts of Appeals that addressed the issue of whether the mixing of water constitutes an "addition" under the CWA reached different conclusions. While *Miccosukee* addressed this issue and resolved the previous conflicts, the Maine SJC's decision in *Warren* illustrates that uncertainty about how to apply Section 401, and specifically how to identify what qualifies as an "addition," persists. It appears that the SJC erroneously ignored *Miccosukee* because that case was based on Section 402.

This Court can clarify this important issue of federal law by expressly establishing that the test for determining whether the mixing of water constitutes an addition – in the context of both sections 401 and 402 – depends on whether the receiving water and the water being introduced are part of distinct water bodies.

The following summary and comparison of pre-*Miccosukee* decisions and post-*Miccosukee* decisions, including the SJC's decision in *Warren*, reveals that, absent clarification by this Court, the courts and regulatory agencies will continue to misinterpret the applicability of Section 401.

A. An Overview of Pre-*Miccosukee* Case Law

Two of the earlier circuit court cases that addressed the question of what constitutes an addition under the CWA are *National Wildlife Federation v. Gorsuch*, 693 F.2d

156 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). At issue in *Gorsuch* was whether water flowing from a reservoir, through a dam, and into a river constituted an addition. *Gorsuch*, 693 F.2d at 165. In *Consumers Power* the issue was whether water withdrawn from Lake Michigan and later returned to the lake after passing through hydroelectric turbines was an addition. The "returned" water contained both live fish and fish parts as a result of fish that were entrained during withdrawal being chopped up by the turbines when the water flowed back into the lake. *Consumers Power*, 862 F.2d at 581-82.

In both cases the courts upheld EPA's position that for there to be an "addition" something must be introduced into navigable water from the "outside world." *Consumers Power*, 862 F.2d at 584; *Gorsuch*. 693 F.2d at 165. Applying this test, both the D.C. Circuit and the Sixth Circuit concluded that the water flowing through the dam and turbines, respectively, did not constitute an addition. *Consumers Power*, 862 F.2d at 584-86; *Gorsuch*, 693 F.2d at 174-75.

Since *Gorsuch* and *Consumers Power*, other courts similarly have focused on whether the water being introduced is from the outside world when assessing whether an addition has occurred. *Dubois v. Department of Agriculture*, 102 F.3d 1273, 1298-99 (1st Cir. 1996) (finding that a river and pond were *distinct* water bodies and that the pumping of water from the lower elevation river to the higher elevation pond thus was an addition); *Catskill Mountains*, 273 F.3d at 492 (finding that the diversion of water from its natural course, through a tunnel, and into a different creek was an addition, the court stated that no one could reasonably argue that the water being diverted

and the receiving water "are in any sense the 'same,' such that 'addition' of one to the other is a logical impossibility").

In the most recent circuit court decision before *Miccosukee*, however, the D.C. Circuit Court of Appeals strayed from the traditional "outside world" test and focused instead on the rate at which water flows through a dam. Initially, in *North Carolina v. FERC*, 112 F.3d 1175, 1187-88 (D.C. Cir. 1997), the court found that a decrease in the amount of water flowing through a dam was not an addition necessitating state certification. While the *North Carolina* court discussed the rate of flow of water passing through a dam, the D.C. Circuit's decision in that case was consistent with its earlier reasoning in *Gorsuch*, and the reasoning of other Circuit Courts: because nothing was introduced from the outside world, there was no "addition" and hence no "discharge."

In 2003, however, the D.C. Circuit abandoned the outside world test. In *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 297-99 (D.C. Cir. 2003), the court found that an increase in the flow of water through a dam is an "addition" that may result in a discharge under Section 401. While the court stated that its holding was consistent with *North Carolina*, the *Alabama Rivers* decision effectively marked the end of the outside world test, at least in the D.C. Circuit. *Id.* at 298. Although the proposed addition of new turbines to an existing project would not result in the introduction of anything new into the river from the outside world, the court found that a mere increase in flow constituted an addition.

B. The Post-*Miccosukee* Confusion

Although *Miccosukee* should have put this issue to rest by effectively overruling the "increased flow" test used in *Alabama Rivers*, in fact the post-*Miccosukee* cases demonstrate increased confusion. The two pre-*Miccosukee* tests, as discussed above, were (1) the outside world test, and (2) the increased flow test. In the wake of *Miccosukee* two additional tests have been added: (1) *Warren's* private control test, and (2) a new test, enunciated by FERC, that considers whether there has been an "alteration" of the water. *FPL Energy Maine Hydro LLC*, 111 F.E.R.C. ¶ 61,104, ¶ 21 (2005); *City of Augusta, Georgia*, 109 F.E.R.C. ¶ 61,210, ¶ 12 (2004).

Under FERC's new test, even without an increase in the rate of flow or an addition of something from outside the water state certification may be required. Although it applied its own reasoning, FERC joined the SJC in disregarding this Court's *Miccosukee* decision.[3] Under FERC's reasoning, all dams result in a "discharge" requiring certification because all dams "alter" the water in some way from its natural state. *FPL Energy Maine Hydro LLC*, 111 F.E.R.C. ¶ 61,104, ¶ 21 (2005) ("dams and the reservoirs they impound can result in a discharge of water that is warmer or colder, more or less turbid, or containing greater or lesser amounts of dissolved oxygen or sediments").

[3] In *City of Augusta, Georgia*, 109 F.E.R.C. ¶ 62,210, ¶ 11, FERC stated that it did not believe the reasoning in *Miccosukee* was relevant in the context of Section 401. In *FPL Energy Maine Hydro LLC*, 111 F.E.R.C. ¶ 61,104, FERC ignored *Miccosukee* altogether and did not discuss the case.

Thus, there are now four distinct interpretations of what constitutes an "addition" under the CWA from a dam that does not introduce any pollutant into the water:

1. This Court, as well as the First, Second, and Sixth Circuits, ask whether something has been added to the water from a different body of water, *i.e.*, from the outside world.
2. The D.C. Circuit asks whether the rate of flow has been increased.
3. The Maine SJC asks whether a dam exercises "private control" over water.
4. FERC asks whether the water has been "altered" from its natural state.

As discussed above in Section I, the test articulated by this Court in *Miccosukee* – whether the water being mixed is from meaningfully distinct water bodies – applies both in the context of CWA sections 401 and 402. The First, Second, and Sixth circuits' outside world test is consistent with *Miccosukee*, but the other three tests conflict with this Court's reasoning in that case. By clarifying that *Miccosukee* controls in the case at bar, this Court can prevent further confusion about the applicability of Section 401 as it applies to water flowing through dams.

III. The State of Maine's expansive application of Section 401 conflicts with FERC's comprehensive licensing authority over hydroelectric generating projects under the FPA.

The SJC in *Warren* interpreted the applicability of and powers granted to the states under Section 401 of the CWA in a way that conflicts not only with the CWA, but

also with the primary authority granted to FERC to regulate hydropower projects. The SJC's broad interpretation of Section 401 effectively allows the State of Maine to displace FERC as the exclusive authority that licenses hydropower projects. *See, e.g., Niagara Mohawk Power Corp. v. New York State Dept. of Envtl. Conservation*, 624 N.E.2d 146, 148 (N.Y. 1993) (the FPA establishes a comprehensive scheme for regulation of hydropower projects, and a state's role under Section 401 is limited to reviewing whether the project meets water quality standards).

The SJC's decision exceeded the scope of the CWA, and hence subverted the FPA, in four ways, as discussed below. Taken together, these four conclusions effectively allow the State of Maine to displace FERC as the primary regulator of hydroelectric facilities in Maine, contrary to the FPA's clear assignment to FERC of that responsibility.

A. The SJC impermissibly broadened the scope of Section 401.

The SJC concluded that the relicensing of a project that authorizes the continued flow of clean water through a dam requires state certification, and the SJC also allowed the inclusion of "reopener" provisions in a certification. As a result, the *Warren* decision effectively opens the door for state control of FERC relicensing proceedings and allows for perpetual state involvement even after a license is issued.

As discussed below, in addition to the impermissible broadening of Section 401 to apply the word "discharge" beyond the addition of something from outside the water body, the SJC also wrongly held that (1) Section 401 requires certification even in the absence of a discharge of

a "pollutant," (2) the continued operation of the Projects will "result in" a discharge even though the discharge (if there were one) already exists, and (3) Section 401(d) authorizes "reopeners" that give the state ongoing regulatory control.

1. Section 401 applies only if there may be a discharge of a pollutant.

The word "discharge" in Section 401 refers only to the discharge of a pollutant, and no such discharge occurs here.[4] The SJC incorrectly concluded that all water flowing through a dam, no matter how clean, constitutes a discharge.

Beginning with the title of the CWA – the "Federal Water Pollution Control Act" – it is clear from the outset that pollution is the *raison d'etre* for the statute. A review of the major substantive provisions of the CWA further demonstrates that the CWA focuses on eliminating or controlling the discharge of pollutants, not on discharges in the abstract.[5]

Section 401 is consistent with the rest of the CWA and focuses on controlling pollutants. That section states that certification is required when a project "may result in any

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[4] The DEP conceded that the operation of these Projects does not result in the discharge of any pollutants. SJC App. tab 25 at 218-228.

[5] *See, e.g.*, 33 U.S.C. § 1251(a) (stating the "national goal" that the discharge of pollutants be eliminated and containing numerous references to the goal of controlling and eliminating pollution); *id.* at § 1252(a) (requiring the EPA to prepare comprehensive programs for preventing, reducing, or eliminating the pollution of navigable waters); *id.* § 1311(a) (prohibiting the "discharge of pollutants" except in compliance with specified provisions).

discharge into navigable waters." 33 U.S.C. § 1341(a)(1). Section 502(16), 33 U.S.C. § 1362(16), recites that "the term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." Reading these provisions together, Section 502(16) provides for the shorthand use of the word "discharge" in lieu of the phrase "discharge of a pollutant" and "discharge of pollutants" (which are separately defined in Section 502(12)).

In stating that the term discharge "includes" the discharge of a pollutant, Congress meant that a discharge *requires* the discharge of a pollutant. The word "discharge" in Section 502(16) is not, despite the SJC's view to the contrary, without limitation. Elsewhere in the CWA, in definitions of the word "discharge," Congress used the phrase "but is not limited to" after the word "includes" when it intended the word "discharge" to encompass more than merely what the statutory section listed. *See, e.g.*, 33 U.S.C. §§ 1321(a)(1) (definition of "discharge" for purposes of that CWA section "includes, but is not limited to"), 1322(a)(9) (same). Congress also used the phrase "but is not limited to" after the word "includes" in another definition in the section of the CWA that applies to Section 401. *Id.* § 1362(14). Congress did *not* do so, however, in the Section 502(16) definition of "discharge." This reflects an indication of Congressional intent to use the word "includes" as a word of limitation, limiting the word "discharge" to a discharge of a pollutant or pollutants.[6]

[6] This interpretation is supported by the statements of several courts that Section 502 does not actually include a "definition" of the word "discharge," but, rather, "provides a statement of inclusion." *See North Carolina*, 112 F.3d at 1187 (D.C. Cir. 1997). *See also PUD #1 of*

(Continued on following page)

2. Continued operation of the Projects will not "result in" a discharge.

Even if the Projects discharged a pollutant into navigable waters, such a discharge would not "result" from licensing authorizing the continued operation of the Projects. These Projects, and the flow of water through them in an "altered" state that is subject to "private control," have existed for many years. *See Warren*, 2005 ME, ¶ 3, App. at A-2. Thus, relicensing of these existing Projects will not "result in" any new discharge. *See North Carolina*, 112 F.3d at 1188 (holding that a water quality certification is not required when a federally-licensed action will not "result in" a new discharge but will only alter a pre-existing discharge; "the word 'result' implies causation. Obviously, a subsequent event cannot be the cause of something that is already in existence" (citation omitted)).

3. Section 401 does not authorize states to include reopeners.

The Certification contains numerous conditions that allow the DEP to "reopen" the FERC license and impose additional or different requirements in the future. Such reopeners exceed the permissible scope of state authority in issuing water quality certifications, and tread on FERC's authority under the FPA.

Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 725 (1994) (Thomas, J., dissenting) ("The term 'discharge' is not defined in the CWA"). Logically, a provision that does not "define" a word would not use the word "means."

A water quality certification addresses whether the federally-permitted activity will meet state water quality standards. Once the certification is issued, the state's job is done. Although CWA Section 401(d) allows states to include conditions to ensure that the federally-permitted activity will comply with state water quality standards, those conditions are enforceable by the federal agency, not by the state. *See* 33 U.S.C. § 1341(d), *Great Northern Paper, Inc.*, 77 F.E.R.C. ¶ 61,066 (1996) ("[O]nce a state has issued certification, the Clean Water Act contemplates no further role for the state in the process of issuing, and ensuring compliance with the terms of, a federal license, except in specified circumstances where a new certification is required").

The CWA does not allow states to reopen certifications or impose additional or different conditions after the federal agency has issued its permit. Indeed, Section 401(a)(5) provides that the *federal license* (in this case, the FERC license) for which the certification was issued may be suspended or revoked by the federal agency – not the state – if a judgment is entered that the licensed activity violates specified provisions of the CWA. 33 U.S.C. § 1341(a)(5). Similarly, Section 401(a)(3) allows states to notify federal agencies that they may not rely on a prior certification if circumstances have changed since the state issued that prior certification. *Id.* § 1341(a)(3). This provision does not, however, allow the states to alter or amend the prior certification (and hence the prior federal license).

Given these CWA provisions governing when the license for the certified activity may be revoked, suspended, or altered, and given the complete absence of any provision in Section 401 authorizing states otherwise to

amend their certifications, it is clear that Section 401 was not intended to authorize states to modify a certification once given and once the federal license to which it relates is issued. Nevertheless, the SJC asserted that nothing in the federal law prohibits "reopeners." *Warren*, 2005 ME, ¶ 26, App. at A-14 to -15.

B. The *Warren* court's expansive interpretation of the scope of CWA Section 401 and the powers it grants to the states is inconsistent with the FPA.

The SJC's broad interpretation of Section 401 effectively allows the State of Maine to displace FERC as the exclusive authority that licenses hydropower projects. By interpreting Section 401 to apply to the discharge of clean water that does not contain pollutants, and to the relicensing of projects that already "discharge" that clean water, the SJC has effectively removed all the limitations in Section 401 on the need for hydropower projects to obtain state water quality certification. Further, by allowing "reopener" conditions in certifications the SJC effectively has allowed the DEP to displace FERC as the licensing authority for hydropower projects in Maine. This significant, ongoing regulatory involvement by the State, and the consequent marginalization of FERC's role, conflicts with the FPA and requires correction by this Court.

1. The FPA's Grant of Power to FERC

Section 4(e) of the FPA empowers FERC to license hydropower projects. 16 U.S.C. § 797(e). Section 27 of the FPA establishes the role of states in the licensing process. *Id.* § 821. This section provides:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested rights acquired therein.

Id.

Focusing largely on the language in sections 4(e) and 27, this Court, in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946), noted that the Federal Power Commission (the predecessor to FERC, *hereinafter* referred to as FERC), save for the specific exceptions carved out in the FPA, is solely responsible for the licensing of hydro projects. *Id.* at 168, 182. *First Iowa* then established that, in general, under the FPA the authority of the federal government supersedes that of state governments. *Id.* at 168. Section 27 saves some authority for the states, but the effect of that section "in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in *irrigation* or for *municipal* or *other uses of the same nature*." *Id.* at 175-76 (emphasis added). By establishing FERC as *the* licensing authority, Congress avoided a system with simultaneous state and federal oversight that would be duplicative and "unworkable." *Id.* at 168.

Since this Court's decision in *First Iowa*, the FPA has been amended to clarify both FERC's and states' roles in the licensing of hydro projects. Specifically, in 1986 Congress updated Section 10(a) of the FPA, the section authorizing FERC to include in its hydropower licenses conditions proposed by the states, to address a project's impacts on fish and wildlife. 16 U.S.C. § 803(a). At the

same time, Congress added Section 10(j), requiring FERC to include in its consideration of a project's impacts on fish and wildlife the recommendations furnished by federal and state environmental agencies. *Id.* § 803(j). However, under Section 10(j) FERC retains discretion with regard to those recommendations.

These amendments reinforce that, even with increased awareness of the significance of environmental issues, FERC remains the sole licensing authority.

Subsequent to the 1986 amendments, in *California v. FERC*, 495 U.S. 490 (1990), this Court reaffirmed its holding in *First Iowa* that the FPA grants FERC exclusive jurisdiction over hydropower project licensing. The SJC's decision in *Warren*, however, threatens FERC's long recognized primacy, creating the very system Congress attempted to avoid and this Court characterized as duplicative and "unworkable." *See First Iowa*, 328 U.S. at 168.

2. The Interplay of the CWA and the FPA

Warren recognizes that in adopting Section 401 of the CWA Congress intended to expand the scope of state involvement in federal licensing proceedings. The SJC, however, has overstepped the limited authority granted to the states by Section 401. Not only did the SJC hold that all dams require state certification, but the SJC allowed the DEP to impose conditions with reopener clauses that would enable the state unilaterally to amend Warren's FERC license and impose new conditions in the future. To allow states the ability, after a FERC license is issued, to make changes in the Section 401 certification, and hence to the FERC license, *American Rivers, Inc. v. FERC*, 129 F.3d 99 (2d Cir. 1997), would conflict with

FERC's determinative role in hydropower licensing proceedings and in enforcing license provisions.[7]

In concluding that nothing in the FPA prohibits the inclusion of reopeners in hydropower licenses the SJC overlooked both the federal-state relationship established by the FPA and the language of FPA Section 6. Section 6 provides in part that "[l]icenses may be . . . altered or surrendered only upon mutual agreement between the licensee and [FERC] after thirty days' public notice." 16 U.S.C. § 799. This restriction on the alteration of a license prevents the unilateral reopening of a license in order to change or implement new license conditions. Nevertheless, it is precisely this power, prohibited by Section 6, that the Maine DEP has sought and that the SJC has wrongly conferred.

In short, the SJC's decision in *Warren* impermissibly invades FERC's exclusive authority to license hydropower projects, expressly granted to FERC by the FPA. In this

[7] *Niagara Mohawk Power Corp. v. New York State Dept. of Envtl. Conservation*, 624 N.E.2d 146, 148 (N.Y. 1993) (the FPA establishes a comprehensive scheme for regulation of hydropower projects, and a state's role under Section 401 is limited to reviewing whether the project meets water quality standards); *Bangor Hydro-Electric Co. v. Board of Environmental Protection*, 595 A.2d 438, 443 (Me. 1991) ("In the overlapping schemes of the Federal Power Act and the Federal Water Pollution Control Act, the [BEP]'s veto is confined to the narrow question whether there is reasonable assurance that the Project will comply with state water quality standards") (citations omitted); *Power Auth. of New York v. Williams*, 457 N.E.2d 726, 730 (N.Y. 1984) (certifying agency is limited to determining whether applicable water quality standards are met and is not authorized to engage in a comprehensive environmental review and balancing of interests); *de Rham v. Diamond*, 295 N.E.2d 763, 767-78 (N.Y. 1973) (certifying agency only has authority to determine whether there is reasonable assurance that the activity will not violate water quality standards).

regard, too, this Court's intervention and correction of the SJC's erroneous holding is needed.

CONCLUSION

The Maine SJC's opinion in *Warren* conflicts with this Court's decision in *Miccosukee*, illustrates the confusion among federal and state courts and agencies about when and how to apply Section 401 of the CWA, and expands the states' role so significantly that the State of Maine effectively displaces FERC as the exclusive authority in the licensing of hydropower projects. In reaching its conclusion, the SJC ignored this Court's precedent, misinterpreted the language of the CWA, and failed to acknowledge the conflict of its conclusions with the comprehensive hydropower licensing scheme Congress established in the FPA. The result is confusion about the application of Section 401 and the proper role of states when issuing water quality certifications. Warren asks this Court to grant certiorari so that the Court can clarify this important area of federal law.

Respectfully submitted,

MATTHEW D. MANAHAN
(Counsel of Record)
NICHOLAS D. LIVESAY
PIERCE ATWOOD LLP
One Monument Square
Portland, Maine 04101
(207) 791-1100
Counsel for Petitioner
S.D. Warren Company

Reporter of Decisions

MAINE SUPREME JUDICIAL COURT
Decision: 2005 ME 27
Docket: Cum-04-314
Argued: November 16, 2004
Decided: February 15, 2005

Panel: SAUFLEY, C.J., and CLIFFORD, *RUDMAN*, ALEXANDER, CALKINS, and LEVY, JJ.

S.D. WARREN COMPANY

v.

BOARD OF ENVIRONMENTAL PROTECTION

RUDMAN, J.

[¶1] S.D. Warren Company appeals from a judgment entered in the Superior Court (Cumberland County, *Cole, J.*), affirming the decision of the Board of Environmental Protection (BEP) approving Warren's application for water quality certification pursuant to section 401 of the Clean Water Act (CWA) of 1972, 33 U.S.C.A. § 1341 (West 2001), and 38 M.R.S.A. § 464 (2001 & Supp. 2004), subject to certain conditions imposed by the BEP pursuant to section 401(d) of the CWA. 33 U.S.C.A. § 1341(d). Warren asserts that the BEP's order should be reviewed de novo without deference to its legal interpretations; that the BEP exceeded its authority when it found that certification was required under the CWA; and that the BEP exceeded its authority when it imposed the specific conditions that it did. We disagree and affirm the judgment of the Superior Court.

I. BACKGROUND

[¶2] Warren owns and operates five contiguous hydroelectric dam projects on the Presumpscot River in Cumberland County. The waters involved in Warren's projects are variously classified as Class A (from the outlet of Sebago Lake to its confluence with the Pleasant River, excluding Dundee Pond), Class B (from its confluence with the Pleasant River to Saccarappa Falls), Class C (from Saccarappa Falls to tidewater), and Class GPA (Dundee Pond). The projects have a combined generating capacity of 7450 kW and provide electricity for Warren's paper mill in Westbrook. The projects operate in the run-of-river mode.[1]

[¶3] All of the projects were constructed in the 1900s. The projects were originally licensed separately between 1979 and 1981. The licenses were to expire in 1999, but were modified in 1996 to continue until 2001. Applications for certification were filed in 1999, subsequently withdrawn and refiled in 2000, 2001, and 2002. In April of 2003 the Department of Environmental Protection (DEP) approved water quality certification for the continued operation of Warren's projects, subject to a number of conditions. In May of 2003 Warren filed a timely appeal from the DEP's decision to the BEP. The BEP adopted the findings of the DEP and affirmed the decision of the DEP in October of 2003. Warren appealed from the decision of the BEP to the Superior Court, which affirmed the decision of the BEP in May of 2004. Warren now appeals from that judgment.

[1] The outflow of the project is approximately equal to the inflow on an instantaneous basis.

II. DISCUSSION

A. Standard of Review

[¶4] We review decisions made by an administrative agency for errors of law, abuse of discretion, or findings of fact not supported by the record.[2] *Melanson v. Sec'y of State*, 2004 ME 127, ¶¶ 7-8, 861 A.2d 641, 643-44. When the Superior Court acts in an intermediate appellate capacity pursuant to M.R. Civ. P. 80C, we review that agency's decision directly. *Id.* "The administrative agency's interpretation of a statute administered by it, while not conclusive or binding on this court, will be given great deference and should be upheld unless the statute plainly compels a contrary result." *Thacker v. Konover*, 2003 ME 30, ¶ 14, 818 A.2d 1013, 1019 (citations and quotation marks omitted).

B. Deference to BEP

[¶5] Warren asserts that the BEP is not entitled to deference when it interprets the CWA because it is interpreting federal law. We disagree. The BEP is accorded substantial deference when it interprets certain federal statutes. The rationale underlying our deference to BEP interpretations is that the BEP has greater expertise in matters of environmental concern and greater experience

[2] Title 38 M.R.S.A. § 341-D(4)(A) (2001) provides that the BEP is not bound by the findings of fact or conclusions of law made by the DEP, but may adopt, modify, or reverse those findings. In this case, all findings of fact and conclusions of law were initially made by the DEP and subsequently adopted by the BEP. Throughout the rest of this opinion, where findings of fact and conclusions of law are referenced, the reference pertains to the findings of fact and conclusions of law made or adopted by the BEP.

administering and interpreting those particular statutes. *See Maritime Energy v. Fund Ins. Review Bd.*, 2001 ME 45, ¶ 9, 767 A.2d 812, 814. The CWA, 33 U.S.C.A. §§ 1251-1387 (West 2001 & Supp. 2004), concerns the environment and it is an act that the BEP has experience administering. In addition, both state and federal law contemplate that the BEP will administer and interpret section 401 for purposes of water quality certification.[3]

[¶6] Additionally, Warren argues that the BEP is a "lay board" and therefore not entitled to deference. We disagree. We have specifically rejected the proposition that a volunteer board is not entitled to deference. The standard is whether the subject matter is beyond the scope of

[3] Maine law provides:

> (1-A) The department may only issue a waste discharge license pursuant to section 414-A, or *approve a water quality certification pursuant to the United States Clean Water Act, Section 401*. . . .

38 M.R.S.A. § 464(4)(F) (2001) (emphasis added).

Federal law provides:

> (a) Compliance with applicable requirements; application; procedures; license suspension
>
> > (1) Any applicant for a Federal License or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency *a certification from the State in which the discharge originates or will originate,* or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, *that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.*

33 U.S.C.A. § 1341(a)(1) (West 2001) (emphasis added).

the BEP's expertise. *Maritime,* 2001 ME 45, ¶ 9 n.2, 767 A.2d at 814. In *Maritime,* we concluded that because the BEP relied on its expertise interpreting the statute it was charged with administering and relied upon its expertise in a field of environmental concern, the BEP's interpretation was entitled to deference. *Id.*

[¶7] In the present case, because the statutes involved are administered regularly by the BEP and because the subject matter is well within the BEP's expertise, the BEP's interpretations, although not conclusive or binding upon us, are entitled to great deference.

C. State Certification

[¶8] It is the responsibility of the Federal Energy Regulatory Commission (FERC), pursuant to the Federal Power Act (FPA), to issue licenses for the construction, operation, and maintenance of hydroelectric dams located in any body of water over which Congress has jurisdiction pursuant to the Commerce Clause of the United States Constitution.[4] 16 U.S.C.A. § 797(e) (West 2000). Section 401(a)(1) of the CWA, 33 U.S.C.A. § 1341(a)(1), requires an applicant for a federal license or permit to conduct any activity that "may result in any discharge into the navigable waters," to provide the licensing or permitting agency with a certification from the state in which that discharge may occur. The purpose of the certification is to confirm that the contemplated discharge will comply with the water quality standards of the CWA and the effected state. In addition, section 401(d) of the CWA, 33 U.S.C.A. § 1341(d), expressly requires the FERC to incorporate "any

[4] U.S. CONST. art. I, § 8, cl. 3.

other appropriate requirement of State law set forth in such certification" into the license.

[¶9] Warren posits that certification authority has not vested because the operation of its dams does not result in a discharge. We disagree. Certification rights under section 401(a)(1), 33 U.S.C.A. § 1341(a)(1), vest in a state if an activity "'may result in' a discharge." *North Carolina v. FERC,* 112 F.3d 1175, 1188 (D.C. Cir. 1997). Once these certification rights have vested in the state, any conditions that the state imposes become conditions on the federal license. *Alabama Rivers Alliance v. FERC,* 325 F.3d 290, 293 (D.C. Cir. 2003).

[¶10] The term discharge is not expressly defined anywhere in the CWA, however, section 502(16), 33 U.S.C.A. § 1362(16) (West 2001), provides that, "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." This statement of inclusion provides "the nearest evidence we have of definitional intent by Congress." *North Carolina,* 112 F.3d at 1187. The phrases "discharge of pollutant" and "discharge of pollutants" are defined by section 502(12):

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any *addition* of any pollutant to navigable waters from any point source, (B) any *addition* of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C.A. § 1362(12) (emphasis added).

[¶11] An "addition" is the fundamental characteristic of any discharge. *See North Carolina,* 112 F.3d at 1188 (a

decrease in the volume of water passing through a dam's turbines adds nothing and therefore cannot be a discharge); *Alabama Rivers Alliance,* 325 F.3d at 299 (increased flow resulting from the replacement of dam turbines is an addition and therefore a discharge).

[¶12] The operation of Warren's dams does result in an addition to the waters of the Presumpscot River and therefore a discharge occurs. When a substance is removed from a navigable body of water and then redeposited into that same body of water it constitutes a discharge pursuant to section 502(12), 33 U.S.C.A. § 1362(12). *See Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 923 (5th Cir. 1983) ("The word 'addition' as used in the definition of the term, 'discharge,' may reasonably be understood to include 'redeposit.'"), *see also Greenfield Mills, Inc. v. Macklin,* 361 F.3d 934, 947-49 (7th Cir. 2004). *Avoyelles* involved a dispute about whether the removal and redeposit of fill materials in a wetland was a discharge.[5] *Avoyelles Sportsmen's League, Inc.,* 715 F.2d at 900. The court dismissed the idea that the substance discharged must come from the outside world. *Id.* at 924 n.43. "This reading of the definition is consistent with both the purposes and legislative history of the statute. The CWA was designed to restore and maintain the chemical, physical and biological integrity of the Nation's waters." *Id.* at 923. When "water leaves the domain of nature and is subject to private control rather than purely natural processes . . . it has lost its status as waters of the United

[5] The present case does not involve fill material, but it does involve the identical statute defining discharge. 33 U.S.C.A. § 1362(12) (West 2001).

States."[6] *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1297 (1st Cir. 1996). Because these waters have lost their status as *waters of the United States*, when they are redeposited into the natural course of the river it results in an addition to the *waters of the United States*. *See id.*

[¶13] Warren is not adding more water to the river. However, a discharge results because Warren's dams remove the water of the river from its natural course, exercise private control over the water and then *add* the water back into the river. This is a discharge pursuant to section 401(a)(1). 33 U.S.C.A. § 1341(a)(1).

[¶14] Warren argues the word "discharge" is limited to "discharge of pollutant" or "discharge of pollutants." We disagree. "Discharge" has been interpreted broadly. *See Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998) ("'Discharge' is the broader term because it includes all releases from point sources, whether polluting or nonpolluting."). It is generally accepted that a dam is a point source. *See Greenfield Mills, Inc.*, 361 F.3d at 947 n.16 ("Here, the artificial mechanism of the dam was used to convey pollutants into the Fawn River, a navigable waterway. Consequently, we believe that the dam constitutes a 'point source.'"). We agree with the holding of *Oregon Natural Desert Ass'n*, 172 F.3d at 1098, that any discharge from a dam, whether polluting or not, is a "discharge" for purposes of section 401(a)(1), 33 U.S.C.A. § 1341(a)(1).

[6] Section 401 of the CWA, 33 U.S.C.A. § 1341, applies to discharges into navigable waters. Navigable waters are defined as the "waters of the United States" at section 502(7), 33 U.S.C.A. § 1362(7).

[¶15] The term "discharge" has been broadly interpreted in the case law because the plain language of section 502, 33 U.S.C.A. § 1362, mandates such an interpretation.

> [W]e look first to the plain meaning of statutory language as a means of effecting legislative intent. Unless the statute itself discloses a contrary intent, words in a statute must be given their plain, common, and ordinary meaning, such as people of common intelligence would usually ascribe to them.

Butterfield v. Norfolk & Dedham Mut. Fire Ins. Co., 2004 ME 124, ¶ 4, 860 A.2d 861, 862 (citations and quotation marks omitted).

[¶16] "Includes" in section 502(16) must be given its plain meaning. The common definition of the word *includes* does not suggest it is a word of limitation. In order for *includes* to operate as a word of limitation it would have to be treated as a synonym for the word *means*.[7] Section 502, 33 U.S.C.A. § 1362, contains the definition of twenty-three different terms and phrases occurring within the CWA. Of those twenty-three definitions, twenty-two of them use the word *means;* only one of them, "discharge," uses *includes*.

[7] The U.S. Supreme Court considered the distinction between the words *includes* and *means*, outside of the CWA context, in *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125-26 n.1 (1934):

> [T]he natural distinction would be that where "means" is employed, the term and its definition are to be interchangeable equivalents, and that the verb "includes" imports a general class, some of whose particular instances are those specified in the definition.

> The argument goes that unless we presume that Congress's use of the term "includes" was the result of careless drafting, it seems that Congress intentionally left the definition of discharge open. . . . Arguably, to give "includes" the same meaning as "means" not only confuses the English language, but also makes a mockery of careful legislative drafting.

Alia S. Miles, Comment, *Searching For The Definition Of "Discharge": Section 401 Of The Clean Water Act,* 28 ENVTL. L. 191, 213 (1998).

[¶17] Accordingly, water that has left its natural state and has been subjected to man-made control constitutes an "addition" upon its return to the same navigable waterway. Any addition to water is fundamental to the definition of the term "discharge." Therefore, the water that leaves the river and runs through the dam before returning to the river constitutes a discharge for the purposes of section 1341.

D. BEP's Authority Under Maine and Federal Law

[¶18] Warren argues that the BEP exceeded its authority under federal and state law because it imposed conditions that seek to enhance water quality, conditions that were not properly adopted through rule-making, conditions that require an unauthorized dissolved oxygen criterion, and conditions that are subject to reopening. We disagree.

[¶19] The conditions do not exceed BEP authority. Because water quality standards are not presently being met, the BEP may impose any conditions necessary to ensure compliance with those standards. *See PUD 1 of*

Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700, 715 (1994); *Bangor Hydro-Elec. Co. v. Bd. of Envtl. Prot.,* 595 A.2d 438, 442 (Me. 1991); 38 M.R.S.A § 464(1) (2001).

[¶20] States are authorized to establish water quality standards pursuant to section 303. 33 U.S.C.A. § 1313 (West 2001). "Those standards shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." *PUD 1,* 511 U.S. at 714. Pursuant to section 401(d), 33 U.S.C.A. § 1341(d), a state may require that applicants for federal permits or licenses comply with both the designated uses and water quality criteria of the state standards established under section 303. 33 U.S.C.A. § 1313.[8] *PUD 1,* 511 U.S. at 715. A state may, in its certification, include conditions necessary to ensure that the applicant will comply with state water quality standards established pursuant to section 303, 33 U.S.C.A. § 1313, and any other appropriate requirement of state law.[9] *Id.*

[¶21] Maine's law is settled in this area. In *Bangor Hydro-Electric Co.,* 595 A.2d at 442 n.4, we concluded that narrative criteria at 38 M.R.S.A. § 465 (2001 & Supp.

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[8] Even though section 303, 33 U.S.C.A. § 1313, is not specifically mentioned in section 401(d), 33 U.S.C.A. § 1341(d), it is incorporated by reference in section 301, 33 U.S.C.A. § 1311 (West 2001), which is specifically mentioned. "Section 303 is always included by reference where section 301 is listed." *PUD 1 of Jefferson County v. Wash. Dep't of Ecology,* 511 U.S. 700, 713 (1994) (citations omitted).

[9] Justice Stevens, in his brief concurrence, was particularly persuaded that states were not restricted in their regulation pursuant to section 401(d), 33 U.S.C.A. § 1341(d), "[n]ot a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require." *PUD 1,* 511 U.S. at 723.

2004), which requires waters "of sufficient quality to support all indigenous fish species," was intended to be an integral part of the water quality standards for the BEP to consider. We also concluded, based upon the specificity of the designated uses at 38 M.R.S.A. § 465, that the Legislature's purpose for the language "suitable for the designated uses" was "that the designated uses actually be present." *Id.* at 442. We stated that when those uses are not presently being achieved, the Legislature intended the quality of the water be enhanced so that the uses are achieved. *Id.*

[¶22] Whether compliance has been achieved and whether the conditions imposed are necessary to ensure future compliance are factual determinations to be made by the BEP. The BEP found that the involved waters were not presently in compliance with the state water quality standards, and that the conditions imposed were necessary to ensure future compliance with Maine's water quality standards. Warren has not sufficiently challenged those factual determinations.[10]

[¶23] Warren argues that the BEP exceeded its authority by including "reopeners" in its certification. We

[10] Warren repeatedly asserts that alternative conclusions could be drawn from certain portions of the record. However, because the Board's findings of fact are reviewed for clear error, whether alternative conclusions could be drawn is not determinative. We do not substitute our judgment for that of an agency on questions of fact provided that the record substantially supports those facts. *See Int'l Paper Co. v. Bd. of Envtl. Prot.*, 1999 ME 135, ¶ 29, 737 A.2d 1047, 1054; 5 M.R.S.A. § 11007(3) (2002). The Board's findings of fact must be upheld, unless Warren can show that those findings are clearly erroneous. *See Bangor Hydro-Elec. Co. v. Pub. Utils. Comm'n*, 589 A.2d 38, 40 (Me. 1991). Warren has not argued on appeal that the record does not substantially support the BEP's factual determinations.

disagree. The BEP included conditions in its certification that permit the certification to be reopened and the conditions amended following notice and hearing. The inclusion of these "reopeners" is permissible under both state and federal law.

[¶24] The U.S. Supreme Court has interpreted section 401(d), 33 U.S.C.A. § 1341(d), broadly to mean that a state may attach *any* conditions that are necessary to ensure compliance with section 303, 33 U.S.C.A. § 1313, limitations and are appropriate under state law. *PUD 1,* 511 U.S. at 713. The "reopeners" were included as a precaution in case the conditions instituted are not sufficient to ensure compliance with state water quality standards and section 303, 33 U.S.C.A. § 1313, limitations. These "reopeners" fit within both the literal language of section 401(d), 33 U.S.C.A. § 1341(d), and the statutory interpretation of the U.S. Supreme Court. *See PUD 1,* 511 U.S. at 713.

[¶25] In *PUD 1,* the court addressed certification conditions generally and not "reopeners" specifically. In *American Rivers, Inc. v. FERC,* 129 F.3d 99 (2d Cir. 1997) "reopeners" were specifically addressed. The position of the FERC, opposing the inclusion of "reopeners," was recited in the court's opinion:

> The Commission primarily fears that "to accept the conditions proposed would give the state the kind of governance and enforcement authority that is critical and exclusive to the Commission's responsibility to administer a license under the Federal Power Act, a power the Courts have repeatedly concluded belongs exclusively to the Commission."

Am. Rivers, 129 F.3d at 111 (quoting FERC's brief).

In response, building upon the holding in *PUD 1*, the court held:

> We have no quarrel with the Commission's assertion that the FPA represents a congressional intention to establish a broad federal role in the development and licensing of hydroelectric power. Nor do we dispute that the FPA has a wide preemptive reach. The CWA, however, has diminished this preemptive reach by expressly requiring the Commission to incorporate into its licenses state-imposed water-quality conditions.

Am. Rivers, 129 F.3d at 111 (citations and quotation marks omitted).

[¶26] The court explained that, even though this result seems to subject the FPA to the whims of the states, the FERC always has the power not to grant the licenses at all. *Id.* While this may occasionally produce harsh results, particularly if construction has already begun, there is no federal statutory authority supporting FERC's position that the FPA prohibits the inclusion of "reopeners." *Id.*

> The Second Circuit's decision, unanimously vacating FERC's orders, is significant for several reasons. First, the decision denied FERC's authority to review or reject Section 401 conditions and required the agency to include conditions in its licenses, thereby enabling states to influence the content of the licenses. *Second, it allowed states to affect licenses already issued by FERC by recognizing the validity of state certification conditions requiring ongoing state review and approval of project changes.* Third, and most important, *American Rivers I* implemented Congress' intent in the CWA to diminish FERC's role as an exclusive hydropower decision-maker by authorizing other resource agencies to condition FERC licenses through statutory provisions like Section 401.

Michael C. Blumm & Viki A. Nadol, *The Decline of the Hydropower Czar and the Rise of Agency Pluralism,* 26 COLUM. J. ENVTL. L. 81, 106 (2001) (emphasis added).

[¶27] Nor does the inclusion of "reopeners" violate Maine law. Under Maine law the BEP has the authority to do that which it is granted authority to do, either expressly or by implication when that authority is essential to the full exercise of its powers specifically granted.

> [P]ublic bodies . . . may exercise only that power which is conferred upon them by law. The source of that authority must be found in the enabling statute either expressly or by necessary inference as an incidence essential to the full exercise of powers specifically granted.

Hallissey v. Sch. Admin. Dist. No. 77, 2000 ME 143, ¶ 11, 755 A.2d 1068, 1072.

[¶28] The BEP is expressly granted the authority to issue section 401(a)(1), 33 U.S.C.A. § 1341(a)(1), certifications pursuant to 38 M.R.S.A. § 464(4)(F)(1-A). Considering the purpose of Maine's water quality standards, stated at 38 M.R.S.A. § 464(1),[11] the authority to include "reopeners" is "essential to the full exercise of powers specifically granted" to the BEP. *See Hallissey,* 2000 ME 143, ¶ 11, 755 A.2d at 1072. This authority is essential because if the

[11] It is the State's objective to "restore and maintain the chemical, physical and biological integrity of the State's waters . . . " 38 M.R.S.A. § 464(1).

conditions are not as effective as planned, the water quality standards will not be met and the BEP's goal to "restore and maintain the chemical, physical and biological integrity of the State's waters . . . " will not be achieved during the forty-year term of the FERC license.[12] The Board's interpretation of 38 M.R.S.A. § 464 as implicitly authorizing the inclusion of "reopeners" is reasonable and the statute does not plainly compel a contrary result.[13]

[¶29] Warren argues that the BEP applied an impermissible dissolved oxygen criteria to its certification. We disagree. This is purely an issue of statutory interpretation. The water quality standards at 38 M.R.S.A. § 465(3)(B) are regularly administered by the BEP and as stated previously are entitled to great deference. *See Thacker,* 2003 ME 30, ¶ 14, 818 A.2d at 1019. The water quality standards at 38 M.R.S.A. § 465(3)(B) are ambiguous as to whether an instantaneous standard is required. If the statute is ambiguous, courts review whether the agency's construction is reasonable. Courts do not "second-guess" an agency on issues within its area of expertise; rather, courts review only to ascertain whether its conclusions are "unreasonable, unjust, or unlawful." *See Town of Eagle Lake v. Comm'r, Dep't of Educ.,* 2003 ME 37, ¶ 5, 818 A.2d 1034, 1037. It does not matter whether an alternative interpretation would also have been reasonable, only that

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[12] The FERC license sought by Warren is to last forty years.

[13] As stated previously,

> [t]he administrative agency's interpretation of a statute administered by it, while not conclusive or binding on this court, will be given great deference and should be upheld unless the statute plainly compels a contrary result.

Thacker v. Konover, 2003 ME 30, ¶ 14, 818 A.2d 1013, 1019 (citations and quotation marks omitted).

the interpretation adopted by the BEP was not unreasonable, unjust or unlawful. Given the purpose of Maine's water quality standards, the BEP's interpretation does not appear unreasonable, unjust, or unlawful.

[¶30] Finally, Warren argues that the BEP adopted a policy that constituted impermissible rule-making. We disagree. The BEP based its determinations of flow levels in the bypass reach sections on a case-by-case basis. The case-by-case determinations made by the BEP do not constitute impermissible rule-making. Not every decision made by an agency constitutes "rule making" despite the fact that many decisions seem, to some extent, legislative in character. *See Fryeburg Health Care Ctr. v. Dep't of Human Servs.,* 1999 ME 122, ¶ 9, 734 A.2d 1141, 1144 ("[A]n agency is not required to use the formal rule making procedures every time it makes a decision interpreting an existing rule."); *Mitchell v. Me. Harness Racing Comm'n,* 662 A.2d 924, 926-27 (Me. 1995) (an agency's interpretation of the statutes it is charged with enforcing does not amount to rule-making).

E. Conclusion

[¶31] In conclusion, the BEP's interpretation of statutes regularly administered by it are entitled to great deference; the BEP's determination that CWA certification rights had vested in the state was not unreasonable; and

finally, the BEP did not exceed its authority under federal or Maine law.

The entry is:

Judgment affirmed.

Attorneys for plaintiff:

Matthew D. Manahan, Esq. (orally)
Catherine R. Connors, Esq.
Pierce Atwood, LLP
One Monument Square
Portland, ME 04101

Attorneys for defendant:

G. Steven Rowe, Attorney General
Carol A. Blasi, Asst. Atty. Gen. (orally)
6 State House Station
Augusta, ME 04333-0006

Attorneys for intervenors American Rivers and Friends of the Presumscot River:

Sean Mahoney, Esq. (orally)
Verrill & Dana, LLP
One Portland Square
Portland, ME 04112-0586
and
Ronald A. Kreisman, Esq.
25 Page Street
Hallowell, ME 04347

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-03-70

S.D. WARREN COMPANY,

Petitioner

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent

ORDER

Before this court is Petitioner, S.D. Warren Company's ("Warren") appeal from the October 2, 2003, decision of Respondent, Maine Board of Environmental Protection ("BEP"), pursuant to M.R. Civ. P. 80C.

FACTS

Petitioner Warren owns and operates the Dundee, Gambo, Little Falls, Mallison Falls and Saccarappa hydroelectric generating dam projects (the "Projects") located on the Presumpscot River. "The Projects have a combined generating capacity of 7,450 kW and are operated to provide electricity to Petitioner Warren's Westbrook paper mill." (R. 278 at 1.) The Projects are operated in the "run-of-river" mode, meaning that outflow from each Project is approximately equal to inflow on an instantaneous basis during normal operating conditions. (R. 259 at 3.)

All of the Projects were constructed in the 1900s and were originally licensed by the Federal Energy Regulatory

Commission ("FERC") in separate actions between October 31, 1979 and September 17, 1981. *Id.* The original expiration dates for these licenses ranged from October 1, 1999 to September 1, 2001. Accordingly, in 1996, at Petitioner Warren's request, the licenses were modified to all expire on January 26, 2001.

On January 14, 1999, Petitioner Warren field [sic] applications for the continued operation of each of the Projects. Certification was also requested in conjunction with Petitioner Warren's Application with FERC for each of the Projects. The applications for certification were subsequently withdrawn and submitted again on January 12, 2000, January 11, 2001, and December 20, 2002. (R. 178-181.)

The Department of Environmental Protection ("DEP") issued its Order in April 2003, approving the applications of Petitioner Warren and granting certification subject to several conditions.[1] Consequently, Petitioner Warren appealed the Order to the BEP on May 29, 2003. Five months later, the BEP denied Petitioner Warren's appeal. Therefore, on October 31, 2003, Petitioner Warren filed this appeal with the Cumberland County Superior Court,

[1] These conditions included restrictions on water levels and flows, requirements that Petitioner Warren avoid maintenance drawdowns of project impoundments during May and June, install upstream eel passage facilities within two years following the issuance of the FERC license, institute operation measures to provide downstream eel passage, install and operate upstream and downstream anadromous fish passage facilities, institute spillage of 50 cfs at the Dundee Dam and 100 cfs at the Gambo Dam in order to meet Class B dissolved oxygen ("DO") standards in the river, and develop and implement a recreational facility enhancement plan for each project. (R. 278.)

pursuant to M.R. Civ. P. 80C.[2] Subsequently, on January 26, 2004, this court granted American Rivers and Friends of the Presumpscot River's Motion to Intervene.

DISCUSSION

A. Standard of Review

Petitioner Warren argues that this court should review the decision of the BEP *de novo*. Conversely, however, the BEP asserts that its decision should be given deference appropriate to its professional and technical expertise.

When a decision of an administrative agency is appealed pursuant to M.R. Civ. P. 80C, this court reviews "the agency's decision directly for abuse of discretion, errors of law, or findings not supported by the evidence." *Centamore v. Dep't of Human Services,* 664 A.2d 369, 370 (Me. 1995) (citation omitted). The focus of the appeal is not whether the court would have reached the same conclusion as the agency, but whether the record contains competent and substantial evidence, which supports the result, reached by the agency. *CWCO, Inc. v. Superintendent of Ins.*, 1997 ME 226, ¶ 6, 703 A.2d 1258, 1261. Deferential

[2] In footnote three in Petitioner Warren's reply brief, it requests that this court modify the record to include the audiotape of this hearing pursuant to M.R. Civ. P. 80C(f). The tapes in question, however, are not required to be kept and contain thoughts of BEP members that would not be necessary to complete the record in this case. Therefore, this court denies Petitioner Warren's motion to modify and grants the BEP's motion to strike footnote 3. *See Murphy v. Board of Environmental Protection,* 615 A.2d 255, 260 (holding that "[t]he Administrative Procedure Act leaves it to the discretion of the trial court to determine whether additional evidence is necessary to complete the record.").

review requires this court to uphold the orders of the BEP if they are based on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *In re Maine Clean Fuels, Inc.,* 310 A.2d 736, 741 (Me. 1973).

Here, the BEP is a volunteer board. Despite this, however, the DEP and the BEP regularly administer the laws in question. Consequently, this court will not "attempt to second-guess the agency on matters falling within its realm of expertise and [instead will] limit our review to determining whether the agency's conclusions are unreasonable, unjust or unlawful in light of the record." *Imagineering v. Department of Professional & Financial Regulation,* 593 A.2d 1050, 1053 (Me. 1991); *Isis Development, LLC. V. Town of Wells,* 2003 ME 149, ¶ 3, n. 4, 836 A.2d 1285. Accordingly, it is necessary for this court to deferentially review the BEP's decision in this case.

B. Does the Clean Water Act Require Certification?

Petitioner Warren contends that the BEP's decision, holding that the Projects require water quality certification under the Clean Water Act ("CWA"), was in error.

The CWA provides, in part that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originate or will originate . . . " 33 U.S.C. § 1341(a)(1) (2004). "The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants. *Id.* at § 1362(16).

The D.C. Circuit has determined that the term "discharge" contemplates the addition of something to the water source. *North Carolina v. FERC,* 112 F.3d 1175, 1187 (D.C. Cir. 1997);[3] *Alabama Rivers Alliance v. FERC,* 325 F.3d 290 (D.C. Cir. 2003) (holding that certification was required when replacement of several turbines resulted in an increased flow of water through a dam.) In addition, the Supreme Court has held that once the certification requirement is triggered by a "discharge" then the certification conditions are not limited to addressing merely the physical quality of the water, but can also require implementation of state water quality standards under the expansive language of § 401(d). *PUD No. 1 of Jefferson County v. Washington Department of Ecology,* 511 U.S. 700, 711 (1994).

In the case at bar, the "run-of-river" operation will be maintained at each Project site. (R. 277 at 91-93.) The Projects, however, will require the rerouting of the natural flow of the river. This court finds that this rerouting of the water constitutes a "discharge" under the CWA. *See PUD No. 1,* 511 U.S. at 711.

Next, Petitioner Warren argues that even if a "discharge" does occur it will not contain pollutants, therefore no certification is required under the CWA. Although not binding on this court, this court finds the decisions of sister states on this issue to be instructive and, in this case, persuasive.

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[3] This court notes that the D.C. Circuit Court addressed whether a mid-term license amendment request triggered Section 401 certification by a bordering state, which is an entirely different issue than the one presented in this case. *See North Carolina,* 112 F.3d at 1176.

The Ninth Circuit Court of Appeals has held that:

> [d]ischarge is the broader term because it includes all releases from point sources, whether polluting or nonpolluting. The D.C. Circuit reached this conclusion in *National Wildlife Fed'n v. Gorusch,* 224 U.S. App. D.C. 41, 693 F.2d 156 (D.C. Cir. 1982). There the court interpreted discharge in section 1362(16) of the Act to include the release from a point source of turbid water that did not contain any pollutant. This is the logical interpretation of § 1362(16) that comports with the structure and lexicon of the Clean Water Act.

Oregon Natural Desert Ass'n v. Dombeck, 172 F.3d 1092, 1098 (9th Cir. 1998), *cert. denied,* 528 U.S. 964 (1999). In addition, the Supreme Court of New York has held that:

> [t]his broad definition of the word "discharge" and its application to "any discharge" in section 401 of the FWPCA requires that we reject petitioner's fundamental argument, i.e., that for section 401 to apply, a discharge must contain a specific and identifiable pollutant. In rejecting that argument, we further note that such an interpretation advances the FWPCA's purpose of insuring the rights of States to eliminate conditions of pollution (see U.S. Code, tit 33, § 1251, subd [b]), including pollution arising from causes other than specific discharges of identifiable pollutants (see US Code, tit 33, § 1314, subd [f], par [2]). para.)

Power Auth. v. Williams, 475 N.Y.S.2d 901, 904 (1984). Therefore, this court finds that certification is required by the CWA, despite the possible nonexistence of pollutants in the "discharge."

Finally, Petitioner Warren opines that even if the Projects will result in a discharge of a pollutant, the "discharge" will not result from the continued operation of the Projects, so certification is not required. The CWA, however, provides that any applicant for a license, which would result in "any discharge," needs to obtain water quality certification. Here, a "discharge" will occur, despite the continued operation of the Projects. Hence, this court finds the BEP's decision, requiring Petitioner Warren to obtain water quality certification, correct as a matter of law.

C. Certification Conditions

The water quality certification in question requires that the Projects maintain seasonally varied minimum flows, install upstream and downstream eel passage, install fish passage facilities, and develop and implement a recreational facility enhancement plan for each project. Petitioner Warren asserts that all of these requirements are void, because the BEP cannot impose conditions to enhance or expand the size of the aquatic habitat. Petitioner Warren also contends that as long as some part of the water attains or supports the designated uses, the water quality standard is being met.

The CWA requires States that issue water quality certifications to impose "limitations" necessary to assure compliance with the State's water quality standards. 33 U.S.C. § 1341(d) (2003). The Law Court has held that when issuing a water quality certification, the State must determine whether all three parts of the Maine water quality standards are met; the designated uses, the numerical criteria for water chemistry and the narrative

criteria. *Bangor Hydro-Electric Co. v. Board of Environmental Protection,* 595 A.2d 438, 442 (Me. 1991). Where water quality standards are not being met, the designated uses "provide goals for states management of its classified waters." *Id.* Furthermore, conditions requiring fish passage and recreational facilities to be installed "clearly bear on the attainment of the designated uses of fishing, recreation, and fish habitat." *Id.* at 433.

1. Bypass Reach Minimum Flows

The Maine Water Classification Program provides that "[t]he Legislature intends by passage of this article to establish a water quality classification system which will allow the State to manage its surface waters so as to protect the quality of those waters and, where water quality standards are not being achieved, to *enhance* water quality." 38 M.R.S. § 464(1) (2003) (emphasis added).

Here, the BEP held that increased flows in the bypass reach are necessary to provide reasonable assurance that the waters will be of sufficient quality to support all aquatic species indigenous to these waters without detrimental changes in the resident biological community. (R. 278 at 6-7.) There is ample evidence in the record to support the BEP's finding that the DEP had authority to restore the previously expired fish species and increase the population and habitat of the existing species. (R. 259); (R. 136 at 70.) Accordingly, based on a totality of the circumstances, this court finds that the BEP's conclusions regarding minimum flows are not clearly erroneous. *See Bangor Hydro-Electric Co.,* 595 A.2d at 442-43 (holding that "[t]he designated uses provide goals for the state's management of its classified waters. We hold that it is proper for the Board

to consider such goals in reviewing a forty year license for compliance with the classification standards . . . "); *PUD No. 1,* 511 U.S. 700 (upholding state water quality certification requirement that a dam owner provide minimum flows to protect fish in the bypass).

2. Upstream and Downstream Eel Passage

The Law Court has held that fish passage measures contained in a certification for the relicensing of a hydroelectric project, "clearly bear on the attainment of the designated uses of fishing, recreation, and fish habitat." *Bangor Hydro-Electric Co.,* 595 A .2d at 443.

In this case, the BEP found that the upstream and downstream eel passage conditions were "necessary to ensure that the project waters will be suitable for the designated uses of fishing and habitat for fish, and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters, subject to the other provisions of the order." (R. 278 at 7.) This court finds that the upstream and downstream eel requirements are supported by substantial evidence in the record. Specifically, the DEP found that while there is evidence that "eel migration and thus overall eel populations would benefit from the installation of upstream passage facilities at each dam, because more eels will successfully pass the dams to reach Sebago Lake with fishways in place than without fishways." (R. 259 at 17-18.) Also, there exists substantial evidence in the record that the dams are affecting the downstream eel passage as well. (R. 174 at 94-98.) Therefore, this court concludes that the BEP's conclusions are based on adequate evidence and are not an abuse of discretion.

3. Fish Passage

"The Legislature declares that it is the State's objective to restore and maintain the chemical, physical and biological integrity of the State's waters and to preserve certain pristine state waters." 38 M.R.S. § 464(1) (2003). "The Legislature further declares that in order to achieve this objective the State's goals are: [t]hat water quality be sufficient to provide for the protection and propagation of fish, shellfish and wildlife and provide for recreation in and on the water." *Id.* at § 464(1)(C). In addition, Class B and C waters are required to be of such quality that they are suitable "as a habitat for fish and other aquatic life." *Id.* at §§ 465(3)(A) and (4)(A). Class B and C waters also must "be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community." *Id.* at §§ 465(3)(C) and 4(C).

Here, the record supports the BEP's finding that "phased installation of upstream and downstream anadromous fish passage facilities at each of the project dams is necessary to ensure that the project waters will be suitable for the designated uses of fishing and habitat for fish, and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters . . . " (R. 278 at 7); (R. 259 at 10-11.) Consequently, this court finds that the BEP's condition regarding fish passage was not clearly erroneous, since "all aquatic species indigenous to the receiving water" should be supported. 38 M.R.S.A. § 465(3)(C) (2003); *Bangor Hydro-Electric Co.*, 595 A.2d at 433.

4. Recreational Facilities

Class B and C waters "shall be of such quality that they are suitable for the designated uses of . . . recreation in and on the water." 38 M.R.S. §§ 465(3)(A) and (4)(A) (2003). In this case, the record adequately supports this determination. (R. 259 at 24-25.) More specifically, the BEP correctly found that Petitioner Warren's dams have eliminated the opportunity for fishing and prevented recreational access in the areas of the river. (R. 278 at 7-9.) Accordingly, this court concludes that the BEP's decision was not erroneous or an abuse of discretion. *See Bangor Hydro-Electric Co.*, 595 A.2d at 442.

D. Antidegradation Policy

Next, Petitioner Warren asserts that the BEP violated the State's antidegradation policy by failing to consider and address the impact of these above conditions on the use of hydroelectric power generation.

"Existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected." 38 M.R.S. § 464(4)(F)(1) (2003). The BEP has broad latitude to place restrictions on Warren's licensed activity to assure compliance with state water quality standards and any other appropriate requirement of state law. *PUD No. 1,* 511 U.S. at 715; 33 U.S.C. § 1341(d) (2003).

In the case at bar, the Order provides that the minimum bypass flows, spillage flows and fish passage facilities required by the Order will reduce average annual generation from 40.5 million to 34.5 million kWh. (R. 259 at 27.) Even though hydropower generation will be

reduced, this court finds that it will still be "maintained and protected" as required by the state's antidegradation policy. Furthermore, this court notes that hydropower is just one of the many designated and existing uses that must be protected in the subject waters. 38 M.R.S. § 464(4)(F) (2003). Thus, this court finds that this slight reduction in the average generation will not violate the state's antidegradation policy.

E. Rulemaking

Petitioner Warren also asserts that the BEP's reliance on the Bureau of Land and Water Quality's Hydropower Project Flow and Water Level Policy, absent rulemaking, ("Water Level Policy") was inappropriate.

> Rule means the whole or any part of every regulation, standard, code, statement of policy, or other agency statement of general applicability, including the amendment, suspension or repeal of any prior rule, that is or is intended to be judicially enforceable and implements, interprets or makes specific the law administered by the agency, or describes the procedures or practices of the agency.

5 M.R.S. § 8002(9) (2003). "The term does not include [a]ny form, instruction or explanatory statement of policy which in itself is not judicial enforceable, and which is intended solely as advice to assist persons in determining, exercising or complying with their legal rights, duties or privileges." *Id.* at § 8002(9)(B)(4). The Law Court has held that "[a]n agency may provide guidance for its employees and the public without adopting the guiding materials as rules, as long as those materials are not intended to have, and are not given, the force and effect of law. *Downeast Energy*

Corporation v. Fund Insurance Review Board, 2000 ME 151, ¶ 23, 756 A.2d 948, 953.

Here, the policy provides that:

> In determining flows and water levels at hydropower projects, the Bureau of Land and Water Quality will operate under the rebuttable presumption that a flow providing wetted conditions in a weighted average of 3/4ths of the cross-sectional area of the affected river or stream, as measured from bank full conditions, or a water level that provides wetted conditions for 3/4ths of the littoral zone of a lake or pond, as measured from full pond conditions, will be needed to meet aquatic life and habitat standards.

(R. 218.) Although the DEP may have used this presumption in making its conclusions, the BEP determined that "the Department did not base its minimum flow determinations on meeting a wetted width requirement . . . " (R. 278 at 12.) This analysis is supported by substantial evidence in the record, because the DEP did not *require* the rewatering of 3/4ths of the width of the bypass channels in its decision. (R. 259 at 19-21.) Instead, the DEP considered many circumstances and established minimum flows for each project on a "case-by-case basis." *Id.* at 19; (R. 278 at 12.) Consequently, based on this analysis as well as 5 M.R.S.A. § 8002(9)(B)(4), this court finds that the BEP's decision was not clearly erroneous.

F. Dissolved Oxygen Criterion

Petitioner Warren further argues that the BEP erred in upholding the instantaneous dissolved oxygen ("DO") criterion. Specifically, Petitioner Warren contends the

numeric water quality standard for DO contained in 38 M.R.S.A. § 465(3)(B) should be interpreted as requiring a calculation based on a daily average not an instantaneous measurement.

"To determine the intent of the Legislature, we look first to the statute's plain meaning and, if there is ambiguity, we look beyond that language to the legislative history. . . . " *Town of Eagle Lake v. Commissioner, Department of Education,* 2003 ME 37, ¶ 7, 818 A.2d 1034, 1037 (citation and quotations omitted). "When interpreting statutes, the Court seeks to discern from the plain language the real purpose of the legislation, avoiding results that are absurd, inconsistent, unreasonable, or illogical." *Id.* (quotations and citations omitted). "Further, we consider the whole statutory scheme for which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Id.* (citations and quotations omitted).

In the present case, the statute provides, that the DO content "shall not be less than 7 parts per million or 75% of saturation, whichever is higher . . . " 38 M.R.S. § 465(3)(B) (2003). This court finds that this language is ambiguous as to whether or not this standard applies instantaneously or based on an average through out any given day. Accordingly, it is necessary to review the legislative history of this section.

Before 1973, the Maine Water Quality Law required that the DO content in Class B waters be not less than 75% of saturation and not less than 5 parts per million "at any time." (P.L. 1967, c. 475 § 4.) In 1973, however, the Legislature removed the words "at any time" from the standard. (P.L. 1973, c. 450 § 5.)

Despite this, however, reading the statute as requiring an "average" standard would lead to an unreasonable result. This is because, as the BEP found, "oxygen levels could in fact fall below the instantaneous minimum threshold of 5 parts per million needed to sustain fish for substantial periods of time during a given day, so long as the daily average DO level was 7 parts per million." (R. 278 at 114.); *Town of Eagle Lake,* 2003 ME 37, ¶ 7, 818 A.2d at 1037 (holding that the court should avoid absurd, inconsistent, unreasonable as well as illogical results.) Consequently, this court finds that the BEP's decision regarding the DO content was correct as a matter of law.

G. Re-Opener Provisions

Petitioner Warren argues that the re-opener provisions contained in the BEP's decision are void.

The CWA provides that any certification "shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply" with the State's water quality standards. 33 U.S.C. § 1341(d) (2003). Moreover, the Second Circuit Court of Appeals has held that FERC did not have authority to reject state-imposed water quality certification conditions, including a broadly worded re-opener clause. *American Rivers v. FERC,* 129 F.3d 99, 111 (2nd Cir. 1997). In fact, FERC itself has taken the position that based on *American Rivers,* "a state may modify a water quality certification when the state has reserved such authority in the certification." *Central Maine Power Co.,* 82 FERC 61,191 at 61,733 (February 26, 1998).

In the case at bar, the re-opener provisions contained in the DEP's decision are specific and are necessary to ensure that the state's water quality standards are met. In addition, the re-opener provisions allow for Petitioner Warren to receive notice and a hearing regarding any project modifications as well as an opportunity to appeal the final decision to the courts. (R. 278 at 19.) In sum, this court finds that the BEP's inclusion of these specific re-opener provisions was not clearly erroneous.

WHEREFORE, this court **DENIES** Petitioner Warren's appeal and **AFFIRMS** the decision of the BEP, pursuant to M.R. Civ. P. 80C.

Dated: May 4, 2004

/s/ Roland A. Cole
Roland A. Cole
Justice, Superior Court

[LOGO] STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATE HOUSE STATION 17 AUGUSTA, MAINE 04333

BOARD ORDER

IN THE MATTER OF

S.D. WARREN COMPANY	)	WATER QUALITY
Gorham, Windham, and Westbrook	)	CERTIFICATION
Cumberland County	)	
PRESUMPSCOT RIVER	)	
HYDRO PROJECTS	)	
#L-19713-33-E-N (Dundee)	)	
#L-19714-33-E-N (Gambo)	)	
#L-19715-33-E-N (Little Falls)	)	FINDINGS OF FACT
#L-19716-33-E-N (Mallison Falls)	)	AND ORDER
#L-19717-33-E-N (Saccarappa)	)	ON APPEAL

Pursuant to the provisions of 38 MRSA Section 341-D and 06-096 CMR Chapter 2 (Rules Concerning the Processing of Applications and Other Administrative Matters), the Board of Environmental Protection has considered the appeal of S.D. WARREN COMPANY of the Department's approval of Warren's application for water quality certification for the continued operation of the Presumpscot River Hydro Projects. Based on a review of the materials submitted by the appellant and other interested parties, and a review of the application with its supportive data, agency review comments, and other related materials on file, the Board FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY

The Dundee, Gambo, Little Falls, Mallison Falls, and Saccarappa Hydroelectric Projects (collectively, the Presumpscot River Projects) consist of five contiguous dams, impoundments, powerhouses, and appurtenant

facilities located on the Presumpscot River in the Towns of Gorham and Windham and the City of Westbrook, Cumberland County, Maine. The projects have a combined generating capacity of 7,450 kW and are operated to provide electricity to S.D. Warren's Westbrook paper mill.

The projects were originally licensed by the Federal Energy Regulatory Commission (FERC) in separate actions between October 31, 1979 and September 17, 1981. The original expiration dates for these licenses ranged from October 1, 1999 to September 1, 2001. In 1996, at S.D. Warren's request, the licenses were modified to all expire on January 26, 2001, in order to facilitate a coordinated review at relicensing.

On January 14, 1999, S.D. Warren filed applications with the Department for Water Quality Certification for the continued operation of each of the Presumpscot River Projects. Certification was requested in conjunction with S.D. Warren's Application for Subsequent License with the FERC for each of the projects. The applications for certification were subsequently withdrawn and refiled on January 12, 2000, January 11, 2001, and December 20, 2002.

By Order #L-19713-33-E-N, #L-19714-33-E-N, #L-19715-33-E-N, #L-19716-33-E-N, and #L-19717-33-E-N dated April 30, 2003, the Department approved water quality certification for the continued operation of the Presumpscot River Projects subject to a number of conditions. In brief, these conditions require that:

- All projects will be operated in a run-of-river mode with maximum 1-foot impoundment fluctuations and with specified minimum flows into the bypass reach at each dam;
- Maintenance drawdowns will be avoided during May and June;

- Upstream eel passage facilities will be installed at all projects within 2 years of issuance of a new FERC license;
- Upon license issuance, operational measures (including generation shutdown for at least 4 hours per night for at least 4 weeks each year) will be instituted at all projects to provide downstream eel passage;
- Specified upstream and downstream anadromous fish passage facilities will be installed and operational at all projects in phases, beginning with the installation of passage facilities at the Saccarappa Project, to be operational no later than 2 years after passage is available at the downstream Cumberland Falls Dam;
- Upon license issuance, spillage of water or other equivalent measures will be instituted at Dundee Dam and Gambo Dam in order to meet Class B dissolved oxygen standards in the river; and
- A Recreational Facility Enhancement Plan will be developed and implemented for each project.

On May 30, 2003, S.D. Warren filed a timely appeal of the Department's action.

On June 30, 2003, timely responses to the appeal were filed by Friends of Sebago Lake, American Rivers and Friends of the Presumpscot River.

2. APPLICABLE STANDARDS FOR APPEAL

38 MRSA Section 341-D(4) provides that the Board is not bound by the Commissioner's findings of fact or conclusions of law but may adopt, modify or reserve findings of fact or conclusions of law established by the Commissioner. Any changes made by the Board must be based upon the Board's review of the record,

any supplemental evidence admitted by the Board and any hearing held by the Board.

Section 24.B(2) of the Department's Chapter 2 Rules provides that the written notice of appeal must include, but need not be limited to, evidence demonstrating the appellant's standing as an aggrieved person, the findings, conclusions or conditions objected to or believed to be in error, the basis of the objections or challenge, and the remedy sought. If the appellant is requesting that supplemental evidence be included in the record and considered by the Board, such a request, with the proposed supplemental evidence, must be submitted with the appeal.

The appellant has not requested that any supplemental information be included in the record.

3. STANDING

The appellant is the licensee and owner of the dams that are subject to the Department's April 30, 2003 certification decision. The appellant is thus an aggrieved person as defined by the Department's Chapter 2 Rules and has standing to bring an appeal.

4. BASIS OF APPEAL

The appellant claims that the Department's April 30, 2003 certification decision suffers from substantial legal and factual infirmities. Specifically, the appellant contends that:

(1) Water quality certification is not required for the FERLC relicensing of the existing Presumpscot River Projects because the relicensing will not result in a discharge into navigable waters, the threshold for requiring certification under Section 401 of the federal Clean Water Act;

(2) Even if certification is required, the Department's authority is limited to ensuring that the activity will comply with State water quality standards, and conditions in the certification regarding bypass reach minimum flows, upstream and downstream eel passage, anadromous fish passage, reaeration, and recreational facilities do not relate to water quality standards;

(3) The certification conditions regarding bypass reach minimum flows are improperly based on a 3/4 wetted width policy that has not been adopted through rulemaking;

(4) The certification decision incorrectly applies an instantaneous, rather than a daily average, dissolved oxygen standard, and fails to properly account for non-point sources of pollution that impact dissolved oxygen levels in the Presumpscot River;

(5) The certification contains numerous conditions requiring that S.D. Warren submit plans for Department approval without providing standards by which the Department will judge the adequacy of these plans, making all such conditions invalid;

(6) The certification contains several conditions that impermissibly allow the Department to "reopen" the certification to impose additional or different requirements in the future;

(7) The certification would mandate non-attainment of the designated use of hydroelectric power generation, in violation of State water quality standards and antidegradation requirements;

(8) The operational restrictions imposed in the certification for downstream eel passage are not consistent with the US Department of Interior's Section 18 fishway prescription; and

(9) The certification improperly, relies on a draft fishery management plan that has not been subject to public notice and comment or finalized in the appropriate manner by the State's fishery resource agencies.

The appellant requests that the Board either revoke the Department's April 30, 2003 decision and declare that no water quality certification is required for the Presumpscot River Hydro Projects, or amend the decision to correct the errors as identified in the appeal.

5. RESPONSE TO APPEAL

(1) *Certification Jurisdiction.*

Section 401 of the Clean Water Act (CWA) (33 USC 1251 *et seq.*) provides that "[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters (of the United States), shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions . . . of this Act."

The appellant urges the Board to adopt a reading of the language of Section 401 that is not consistent with the broad language of the statute.

Section 401 does not, as appellants suggest, state that in order to trigger the requirement for a water quality certification, a discharge must contain pollutants or some other substance; or that it be different in kind or volume from a discharge that was permitted under an older, expired license. Rather, it requires a water quality certification for an activity for which a federal

license is necessary that "may result in *any discharge* into the navigable waters" (emphasis added). This includes releases of water from a dam that contain no pollutants. In fact, under the CWA, the term "discharge" is defined more broadly than the term "discharge of pollutants." Section 502 of the CWA states that "[t]he term 'discharge' when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants," thus indicating that it includes more than simply the discharge of pollutants. This reading of Section 401 is consistent with the Congressional policy of recognizing the "primary responsibilities and rights of States to prevent, reduce and eliminate *pollution,*" 33 U.S.C. Section 1251 (emphasis added), which is defined as the "man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water," 33 U.S.C. Section 1362. *See also PUD No. 1 v. Washington Dep't of Ecology,* 511 U.S. 700, 710 (1994) (noting "[t]here is no dispute that petitioners were required to obtain a certification from the State pursuant to [section] 401" because petitioners "concede that, at a minimum, the project will result in two possible discharges," including "the discharge of water at the end of the tailrace after the water has been used to generate electricity").

The Environmental Protection Agency (EPA), which is responsible for implementing the Clean Water Act, has taken the position that "any discharge" as used in Section 401(a) is broader than "discharge of pollutants." Additionally, FERC has consistently taken the position that applicants for hydropower project licensing or relicensing are subject to Section 401 certification, and has adopted regulations (18 CFR Sections 4.38 and

16.8) requiring that any application for licensing or relicensing must include either (A) a copy of a certification, (B) a copy of a request for certification, including proof of the date on which the certifying agency received the request in accordance with applicable law governing filings with that agency, or (C) evidence of a waiver of certification.

Finally, by Executive Order No. FY 96/97, the Governor of the State of Maine has designated the Department of Environmental Protection as the agency responsible for certifying compliance with applicable water quality standards, pursuant to Section 401 of the Clean Water Act, for all activities within the state not subject to Land Use Regulation Commission permitting review and approval, "including, but not limited to, the licensing and relicensing of all existing hydropower projects."

In its April 30, 2003 Order, the Department determined that the proposed continued operation of the Presumpscot River Projects qualifies as an activity that is subject to Section 401 certification. The appellant has not presented any persuasive arguments or supplemental evidence calling into question the Department's determination that Section 401 certification is required for the relicensing of the Presumpscot River Projects. Specifically, the appellant has not identified any controlling legal precedent to support its theory that Section 401 certification is not required for the relicensing of these or any other hydropower projects.

(2) *Conditions of Certification.*

Under Maine's Water Classification Program, 38 MRSA Sections 464-469, there are four

classifications (Class AA, A, B, and C) of fresh surface waters and one classification (Class GPA) of great ponds. Each classification sets forth the designated uses, numeric standards, and narrative standards applicable to that class of waters.

The waters of the Presumpscot River that are or may be affected by the Presumpscot River Projects are variously classified as Class A (from the outlet of Sebago Lake to its confluence with the Pleasant River, excluding Dundee Pond), Class B (from its confluence with the Pleasant River to Saccarappa Falls), Class C (from Saccarappa Falls to tidewater), and Class GPA (Dundee Pond).

Under the State's antidegradation policy; which is included in the Water Classification Program at 38 MRSA Section 464(4)(F), the Department may only approve water quality certification if the standards of classification of the waterbody and the requirements of the antidegradation policy are met The antidegradation policy further provides that the Department may approve water quality certification for a project affecting a waterbody in which the standards of classification are not met if the project does not cause or contribute to the failure of the waterbody to meet the standards of classification.

With respect to minimum flows at the Dundee Project, in its April 30, 2003 Order, the Department determined that the applicant's proposals for providing seasonally varied minimum flow releases (57 cfs from May 1 through September 30, 30 cfs in April and October, and 20 cfs from November 1 through March 31) in the 1,075-foot-long Dundee bypass reach will be adequate to ensure that these waters will be suitable for the

designated uses of habitat for fish and for fishing, subject to the other provisions of the Order. The Department further determined that minimum flows of 60 cfs from May 1 through October 31 and 40 cfs from November 1 through April 30 are necessary to ensure that the waters in the Dundee bypass reach will be suitable for the designated use of habitat for fish and aquatic life and that the identified waters will be of sufficient quality to support all aquatic species indigenous to these waters without detrimental changes in the resident biological community.

With respect to minimum flows at the Gambo Project, in its April 30, 2003 Order, the Department determined that a year-round minimum flow of 40 cfs in the 300-foot-long Gambo bypass reach is necessary to ensure that these waters will be suitable for the designated uses of habitat for fish and for fishing, and that the identified waters will be of sufficient quality to support all species of fish indigenous to these waters, subject to the other provisions of the order. The Department further determined that a year-round minimum flow of 60 cfs is necessary to ensure that the waters in the Gambo bypass reach will be suitable for the designated use of habitat for aquatic life and that the identified waters will be of sufficient quality to support all aquatic species indigenous to these waters without detrimental changes in the resident biological community, subject to the other provisions of the order.

With respect to minimum flows at the Mallison Falls Project, in its April 30, 2003 Order, the Department determined that seasonally varied minimum flows (60 cfs from May 1 through September 30 and 40 cfs from October 1 through April 30) in the 675-foot-long Mallison Falls

bypass reach are necessary to ensure that these waters will be suitable for the designated uses of habitat for fish and for fishing, and that the identified waters will be of sufficient quality to support all species of fish indigenous to these waters, subject to the other provisions of the order. The Department further determined that minimum flows of 60 cfs from May 1 through October 31 and 40 cfs from November 1 through April 30 are necessary to ensure that the identified waters will be suitable for the designated use of habitat for aquatic life and that the waters in the Mallison Falls bypass reach will be of sufficient quality to support all aquatic species indigenous to these waters without detrimental changes in the resident biological community, subject to the other provisions of the order.

With respect to upstream eel passage, in its April 30, 2003 Order, the Department determined that the installation of upstream eel passage facilities at all five project dams is necessary to ensure that the project waters will be suitable for the designated uses of fishing and habitat for fish, and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters, subject to the other provisions of the order.

With respect to downstream eel passage, in its April 30, 2003 Order, the Department determined that the applicant's proposals for downstream eel passage (suspending generation at all five projects for 4 hours per night for four one-week periods during the downstream eel migration season, and conducting a 3-year study to determine the exact timing of the generation shutdown) will be adequate to ensure that the project waters will be suitable for the designated

uses of fishing and habitat for fish, and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters, subject to the other provisions of the order.

With respect to anadromous fish passage, in its April 30, 2003 Order, the Department determined that the phased installation of' upstream and downstream anadromous fish passage facilities at each of the project dams is necessary to ensure that the project waters will be suitable for the designated uses of fishing and habitat for fish, and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters, subject to the other provisions of the order.

With respect to reaeration, in its April 30, 2003 Order, the Department determined that the spillage of 50 cfs at the Dundee Project and 100 cfs at the Gambo Project under specified river temperature conditions, or other equivalent measures, are necessary to meet Class B dissolved oxygen standards in the river under dry weather conditions.

With respect to recreational facilities, in its April 30, 2003 Order, the Department determined that the applicant's proposals to develop a Recreational Facility Enhancement Plan for each of the five projects, consisting of various measures intended to maintain and/or enhance recreational access and use in the project areas, will be adequate to ensure that the project waters are suitable for the designated use of recreation in and on the water, subject to the other provisions of the order.

The appellant has not presented any persuasive arguments or supplemental evidence calling into question the Department's determinations that the conditions in the Section 401 certification regarding bypass reach minimum flows, upstream and downstream eel passage, anadromous fish passage, reaeration, and recreational facilities are necessary to ensure that the operation of the Presumpscot River Projects will comply with State water quality standards.

Warren argues that the Department has no authority to condition its Section 401 certification for these projects (and, by extension, for any other hydropower projects) to impose minimum flow, fish passage, or recreational facilities requirements (dissolved oxygen is discussed below). Warren's position is that, as long as the designated uses of fish, fishing, and aquatic habitat are present to any degree in any portion of the river, then water quality standards are being attained. We note that the appellant has not appealed minimum flow requirements for Little Falls and Sacarrappa, given that these were proposed by Warren in its application. See Appeal of S.D. Warren at 10.

Generally, when issuing a water quality certification, the State must determine whether all three parts of Maine water quality standards will be met; the designated uses, the numerical criteria for water chemistry, and the narrative criteria. *Bangor Hydro-Electric Company, et al. v. Board of Environmental Protection,* 595 A 2d. 438, 442 (Me. 1991). In determining whether the project will comply with the designated uses for the water body, it is not enough that the quality of the water is such that it may *potentially* support

the use. Rather the Department must decide whether "the designated uses actually were achieved in a particular river." *Id.* Moreover, the "classification statute recognizes that all water quality standards may not be achieved at a given time." *Id.* Where water quality standards are not being met, the designated uses "provide goals for the state's management of its classified waters." *Id.* In the Bangor Hydro case, the Supreme Judicial Court held that it was proper for the Board to consider such goals in reviewing a new license for an existing hydropower project. *Id.* at 443. *See also PUD No. 1 of Jefferson County v. Washington Department of Ecology,* 511 U.S. 700 (1994) (a minimum flow requirement imposed by the State of Washington was appropriate and necessary to meet the designated use of fish habitat).

More specifically, water quality standards for the waters in question require that the waters be suitable for the designated uses of fishing, recreation and as habitat for fish and other aquatic life; and that the habitat be characterized, for Class A and Class B waters, respectively, as "natural" or "unimpaired." 38 MRSA Section 465. "Unimpaired" is defined as "without diminished capacity to support aquatic life." 38 MRSA Section 466(11). "Natural" is defined as "a state of nature not measurably affected by human activity." 38 MRSA Section 466(9). The statute also provides that for Class B waters, "the receiving waters shall be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community." 38 MRSA Section 465(3). "Without detrimental changes in the resident biological community" means "no significant loss

of species or excessive dominance by any species or group of species attributable to human activity." 38 MRSA Section 466(12), Nowhere, as appellant suggests, does the statute state that "some" of the waters be suitable for the designated uses; that "some" of the aquatic species indigenous to the waters be supported; or that "some" of the habitat must be unimpaired or natural. On the contrary the terms "receiving waters" and "habitat" are unqualified and the statute specifically states that the water quality must be such as to support "all" indigenous aquatic species.

The record in this case demonstrates that Warren's dams have caused long stretches of the natural river bed to be essentially dry and thus unavailable as habitat for indigenous populations of fish and other aquatic organisms; that the dams have blocked the passage of eels and sea-run fish to their natural spawning and nursery waters; that the dams have eliminated the opportunity for fishing in long stretches of river, and that the dams have prevented recreational access to and use of the river. Appellant's contention that water quality standards are being attained as long as the designated uses of fish, fishing, and aquatic habitat are present to any degree in any portion of the river is thus contrary to the language of the statute and to the Legislature's stated objective "to restore and maintain the chemical, physical and biological integrity of the State's waters." 38 MRSA Section 464(1).

Warren further contends that fish passage conditions in the certification go beyond the Department's authority to issue water quality certification because they address fisheries management issues under the jurisdiction of other

State and federal agencies. The Maine Supreme Judicial Court, however, has found that mitigation measures, specifically, fish passage and recreation facilities, "clearly bear on the attainment of the designated uses of fishing, recreation, and fish habitat" *Bangor Hydro-Electric Co., et al. v. Board of Environmental Protection,* 595 A.2d 438, 443 (Me. 1991). In that case, the Board denied Bangor Hydro-Electric's application for water quality certification when it failed to produce information regarding its planned mitigation measures, including fish passage and recreational facilities. The Court held that the Board was within its authority under the water quality laws to request information regarding fish passage as part of the water quality certification review. *See also, PUD No. 1,* 511 U.S. 700, 715 (1994) (state water quality certification requirement that a dam owner provide minimum flow to protect fishery in the by-pass reach consistent with the designated use of fish habitat was appropriate under Section 401).

Finally, Warren contends that the DEP's *2002 Integrated Water Quality Monitoring and Assessment Report* does not list the Presumpscot River as being impaired for any reason other than dissolved oxygen, and therefore the conditions in the certification relating to minimum flows, fish apssage [sic] and recreational facilities are unjustified. However, the report cited by Warren is a draft, not a final, report to EPA on the water quality attainment status of all of the state's waters. It is anticipated that the final report will reflect the status of attainment of the Presumpscot River as discussed in the DEP's April 30, 2003 certification Order.

With respect to dissolved oxygen, Warren's argument is that the Department has no authority to condition its Section 401 certification for the Dundee and Gambo Projects to impose reaeration requirements. Warren's position is that the dams pre-date water quality standards and that the operation of the projects does not result in a violation of dissolved oxygen standards.

However, this argument ignores the fact that, based on the evidence in the record, the Dundee and Gambo Dams clearly cause or contribute to the current violation of dissolved oxygen standards in several parts of the Presumpscot River. Were these dams not in place and operating in such a way as to reduce natural reaeration, to increase time of travel, to increase water temperature, and to create settling basins for sediments and nutrients, dissolved oxygen standards would be met in the Gambo, Little Falls, and Saccarappa impoundments, particularly under dry weather conditions when the effect of non-point source pollution on dissolved oxygen levels is minimal. Under these circumstances, it is necessary and appropriate to condition fire operation of the Dundee. and Gambo Dams to require such changes as will eliminate the dams' contribution to the violation of dissolved oxygen standards. To do otherwise would be to condemn the river to its current condition, with the survival, growth and reproduction of fish and other aquatic animals being compromised by these dams, and with dissolved oxygen standards continuing to be violated, due in part to these dams and their current operation.

Warren's argument also ignores the fact that water quality standards apply to all activities, including those that pre-date the enactment of the

standards. Water quality standards have been applied since their adoption to many pre-existing activities, including the discharge of waste water from Warren's own Westbrook paper mill. It is largely through the application of water quality standards to existing waste water discharges and to the operation of existing dams that the water quality of Maine's rivers and streams has been improved over the last 30-plus years. To argue that Warren's dams are not subject to water quality standards is to argue the Presumpscot River is somehow exempt from meeting the standards that apply to all other rivers in the State, or that the Presumpscot River dams are somehow exempt from the kind of regulation that has been applied for over 20 years to all other dams in the State. There is no basis in law or regulation for such an exemption.

(3) *Minimum Flow Policy.*

The waters of the Presumpscot River in the bypass reaches below the Dundee, Gambo and Mallison Falls Dams are variously classified as Class A and B waters.

Under Maine's Water Classification Program, 38 MRSA Sections 464-469, Class A and B waters shall be of such quality that they are suitable for the designated use of, among other things, habitat for fish and other aquatic life, and shall be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community.

In its April 30, 2003 Order, the Department stated that it has found that, generally, flows.

providing wetted conditions in a weighted average of 3/4ths of the cross-sectional area of a river or stream, as measured from bank full conditions, are sufficient to meet aquatic life and habitat standards. The Department further stated that each waterway is different in terms of the value of various flows in providing habitat for aquatic life, and that conflicts may exist between the habitat needs of various resident aquatic organisms. Finally, the Department stated that, as a result, on a case-by-case basis, it often, establishes alternative flows based on identified site-specific conditions and data, where those alternative flows can be shown to meet all water quality standards.

In its April 30, 2003 Order, the Department then presented the case-by-case analysis of the bypass flows needed to meet aquatic life standards at the Presumpscot River Projects that was done in this case. Based on this analysis, the Department determined that:

- The applicant's proposals for maintaining existing leakage flows at the Little Falls and Saccarappa Projects were adequate to ensure that the waters of these bypass reaches will be suitable for the designated use of habitat for aquatic life and that all applicable numeric and narrative water quality standards for these waters will be satisfied;

- A year-round minimum flow of 60 cfs at the Gambo Project was necessary to ensure that the waters of this bypass reach will be suitable for the designated use of habitat for aquatic life and that these waters will be of sufficient quality to support all aquatic species indigenous to these waters

without detrimental changes in the resident biological community; and

- Seasonally varied minimum flows (60 cfs from May 1 through October 31 and 40 cfs from November 1 through April 30) at the Dundee and Mallison Falls Projects were necessary to ensure that the waters of these bypass reaches will be suitable for the designated use of habitat for aquatic life and that these waters will be of sufficient quality to support all aquatic species indigenous to these waters without detrimental changes in the resident biological community.

The appellant has not presented any persuasive arguments or supplemental evidence calling into question the basis for the Department's determination regarding the minimum flows needed to meet water quality standards in the Dundee, Gambo, and Mallison Falls bypass reaches.

Warren argues that, in determining bypass reach minimum flows, the Department improperly applied an internal Department policy that has not been adopted through rulemaking. Warren's position is that, because the policy is in effect a rule, the Department may not use the policy to impose a ¾ wetted width requirement for bypass reach minimum flows.

However, it is clear that, in its April 30, 2003 Order, the Department did not base its minimum flow determinations on meeting a wetted width requirement that has not been adopted by rule. Rather, the evidence in the record clearly demonstrates that the Department made a case-by-case determination of the habitat value of various bypass reach minimum flows based on a

substantial body of substrate and habitat suitability data, much of which was derived from studies conducted by Warren. Further, none of the minimum flow requirements imposed by the Department actually requires maintenance of ¾ wetted width conditions, and only one flow (60 cfs in the Mallison Falls bypass reach from May 1 through October 31) exceeds ¾ wetted width conditions. Indeed, for the Little Falls and Saccarappa bypass reaches, the Department determined that, based on the limited habitat value of the predominant ledge substrate, existing leakage flows would be sufficient to meet water quality standards, and wetted width conditions were not even calculated for these bypasses.

Finally, it should be noted that the bypass flow conditions for the Dundee and Mallison Falls Projects imposed by the Department's April 30, 2003 Order are very similar to the proposals made by Warren in its application. Warren has provided no reason why, if these proposals were acceptable at the time of the application, they have become less so now.

(4) *Dissolved Oxygen Standard.*

The waters of the Presumpscot River are classified as Class B waters from its confluence with the Pleasant River (located at about the half-way point along the Gambo impoundment) to Saccarappa Falls (at the location of the Saccarappa Dam).

Under Maine's Water Classification Program, 38 MRSA Section 464-469, the dissolved oxygen content of Class B waters shall be not less than 7 parts per million or 75% of saturation, whichever is higher, except that for the period from October

1st to May 14th, in order to ensure spawning and egg incubation of indigenous fish species, the 7-day mean dissolved oxygen concentration shall not be less than 9.5 parts per million and the 1-day minimum dissolved oxygen concentration shall not be less than 9.5 parts per million in identified fish spawning areas.

In its April 30, 2003 Order, the Department determined that water quality modeling predicted non-attainment of Class B dissolved oxygen (DO) under critical water quality conditions (summer low flow/high temperature conditions) in portions of the Little Falls, Mallison Falls, and Saccarappa impoundments. The Department also determined that actual in-stream monitoring showed non-attainment of Class B DO standards in the lower Gambo, Little Falls, and Saccarappa impoundments during the summers from 1997 through 2002.

In its April 30, 2003 Order, the Department further determined that the non-attainment of dissolved oxygen standards in the Presumpscot River is the result of (1) the existence of multiple impoundments in close proximity to one another, (2) the lack of natural reaeration below the dams, (3) the over-night respiration of bottom attached algae, and (4) the impacts of non-point sources of pollution (e.g., agricultural runoff and sedimentation from land use activities). The Department also determined that, were it not for the presence of the project dams, the Presumpscot River would meet Class B DO standards, particularly under dry weather conditions when the effect of non-point source pollution on dissolved oxygen levels is minimal. Finally, the Department determined that the project dams cause or contribute to the

violation of dissolved oxygen standards in the river.

In its April 30, 2003 Order, the Department specifically noted that Warren, as the owner of the Presumpscot River Projects, should not be responsible for the abatement of non-point source pollution or for mitigating the effects of such pollution on dissolved oxygen concentrations under wet weather conditions.

The appellant has not presented any persuasive arguments or supplemental evidence calling into question the Department's decision to apply an instantaneous dissolved oxygen standard. In addition, the appellant has not presented any persuasive arguments or supplemental evidence demonstrating that the Department failed to properly account for non-point sources of pollution that impact dissolved oxygen levels in the Presumpscot River.

Warren's arguments are (1) that the current dissolved oxygen standard should be measured on a daily average, rather than an instantaneous, basis and (2) that, contrary to its statements, the Department has made Warren responsible for the impact of non-point source pollution during dry periods.

With respect to the dissolved oxygen standard, the Department has consistently interpreted and applied the Class B dissolved oxygen standard of 7 parts per million as an instantaneous minimum standard in all of its licensing, permitting and certification actions. The Department has also consistently developed water quality models and conducted water quality monitoring to determine instantaneous DO levels, in keeping

with EPA program guidance and protocols. Indeed, EPA water quality criteria for ambient dissolved oxygen concentration (1986 "Gold Book") specify that the 5.0 milligram per liter (which is equivalent to parts per million) minimum criterion for early life stages of coldwater and warmwater fish should be considered as instantaneous concentrations to be achieved at all times. This criterion has been applied as an instantaneous standard in all of the Department's licensing, permitting and certification actions, including the licensing of the waste water discharge from Warren's Westbrook paper mill.

Applying Warren's reasoning, oxygen levels could in fact fall below the instantaneous minimum threshold of 5 parts per million needed to sustain fish for substantial periods of time during a given day, so long as the daily average DO level was 7 parts per million. This could result in the outcome that fish would be dead or dying due to oxygen deprivation while dissolved oxygen standards, designed to protect fish, were still being met.

There is nothing in the law to suggest that minimum DO levels only need be met on a daily average basis, and there is nothing in biology to suggest that fish and other aquatic organisms can survive with minimum DO levels provided only on a daily average basis.

With respect to the impact of non-point source pollution, the evidence in the record clearly demonstrates that, under summer low flow conditions, the impact of tributary flows on the dissolved oxygen levels in the Presumpscot River is so small as to be within measurement error. Therefore, there is no impact of non-point source

pollution on DO levels in the river during dry periods, and Warren is not being held responsible, for mitigating the impact of non-point source pollution. The only impact Warren is being held responsible for mitigating is the impact of its dams on DO levels in the river.

Finally, the water in the Presumpscot River, especially under low flow conditions, is basically Sebago Lake water, which is of such purity that it is distributed to the customers of the Portland Water District virtually without treatment. Were it not for the presence of Warren's dams, it is expected that the Presumpscot River would meet applicable dissolved oxygen standards throughout its length from Sebago Lake to the ocean.

(5) *Condition Compliance Approvals.*

As noted on page 2 above, the Department's April 30, 2003 Order included a number of conditions deemed necessary to assure that the continued operation of the Presumpscot River Projects would meet water quality standards. These conditions included requirements for run-of-river operation with maximum impoundment fluctuations and specified minimum bypass flow releases at each project; installation and operation of upstream eel passage facilities at each project; implementation of operational measures to provide downstream eel passage at each project; the phased installation and operation of specified upstream and downstream anadromous fish passage facilities, beginning at the Saccarappa Project; implementation of specified reaeration measures at Dundee Dam and Gambo Dam; and development and implementation of a Recreational Facility Enhancement Plan for each project.

In its April 30, 2003 Order, the Department also included a number of conditions requiring that Warren submit various plans to assure compliance with the conditions noted above. These compliance conditions included requirements for Warren to submit the following plans:

- Plans for providing and monitoring run-of-river operations, impoundment levels, and minimum bypass flows as required by Parts A and B of Condition 1;
- Plans for a study to evaluate the effectiveness of minimum bypass flows required by Part B of Condition 1 in providing habitat for Atlantic salmon;
- Final design and operational plans for the upstream eel passage facilities required by Part A of Condition 3;
- Plans for a study or studies to determine the effectiveness of the upstream eel passage facilities required by Part A of Condition 3;
- Plans for a study to determine the exact timing of the operational measures (i.e., generation shutdown) to provide downstream eel passage as required by Part B of Condition 4;
- Final design and operational plans for the upstream and downstream anadromous fish passage facilities required by Parts A and B of Condition 5;
- Plans for a study or studies to determine the effectiveness of the upstream and downstream anadromous fish passage facilities required by Parts A and B of Condition 5;

- Plans for providing and monitoring spillage or other approved reaeration measures at the Dundee Dam and Gambo Dam as required by Part A of Condition 6;
- Plans for a study or studies to determine the effectiveness of the spillage or other measures taken pursuant to Part A of Condition 6 in meeting Class B dissolved oxygen standards; and
- A Recreational Facility Enhancement Plan for each project as required by Part A of Condition 7.

Finally, in its April 30, 2003 Order, the Department required that all condition compliance plans be reviewed and approved by the DEP.

The appellant has not presented any persuasive arguments or supplemental evidence calling into question the validity of the Department's conditions requiring that Warren submit various condition compliance plans for DEP review and approval.

Warren instead argues that the plans required by the Department are illegal, because the Order does not include the standards that the Department will use to judge the adequacy of the plans, and that, as a consequence, these plans should not be required.

Contrary to Warren's argument, however, the Department's conditions requiring the submittal, review and approval of plans are both legal and appropriate mechanisms for ensuring that water quality standards are met. The purpose of the required condition compliance plans is to provide assurance that Warren will in fact undertake

sufficient actions to satisfy its obligations to comply with the requirements of the water quality certification. And these condition compliance plans are then reviewed and approved based on the requirements of the certification.

For example, Warren's design and operational plans for Phase I upstream anadromous fish passage facilities at the Saccarappa Dam will be reviewed by the Department to determine whether the proposed facilities constitute a Denil fish ladder, or other passage facilities of comparable efficiency in passing the target species, designed to pass at least 18,000 American shad, 109,000 blueback herring, and 273 Atlantic salmon annually, and that these facilities, which shall include a counting, trapping and sorting facility, will be operational no later than 2 years after passage is available at the downstream Cumberland Mill Dam, as required by Condition 5(A) of the Department's April 30, 2003 Order. In reviewing Warren's plans, the Department will consider the recommendations of the Atlantic Salmon Commission and the Department of Marine Resources, the state agencies with management responsibility for various anadromous fish species and with experience in fish passage design and operation. While varying in form, other conditions requiring the submittal of plans are similarly clear with regard to Warren's compliance obligations.

DEP, FERC and numerous other regulatory agencies have long required the submittal, review and approval of plans intended to demonstrate compliance with permit, license and certification conditions. These have worked well both for regulatory agencies and the regulated community. If plans are submitted that are sufficient to satisfy

the relevant condition of the license, permit or certification, the plans are approved. If plans are submitted that are not sufficient to satisfy the relevant regulatory condition, the plans are either (a) denied and returned for revision and resubmittal or (b) approved with appropriate modifications.

In the absence of employing condition compliance requirements, the Department's only option for ensuring that its water quality certification requirements would be satisfied would be to deny certification, pending the submittal, review and approval of all compliance plans. This option would be much more inefficient and costly for both the Department and the applicant, especially in cases where compliance is not due for some time and where plans reviewed and approved now may be subject to revision and the need for further review and approval in the future.

Further, any decision by the Department to approve, deny or modify Warren's compliance plans constitutes a final agency action that is subject to administrative and judicial appeal. Any objection that Warren has to the Department's decision regarding the adequacy of Warren's compliance plans may be raised through appeals of these compliance decisions.

Finally, Warren has not objected to the requirements that it submit plans for providing and monitoring run-of-river operations, impoundment levels, and minimum bypass flows and for a study to evaluate the effectiveness of minimum bypass flows in providing habitat for Atlantic salmon. These requirements are not fundamentally different in kind from those objected to by

Warren. If these requirements are acceptable, then all other requirements in the Department's April 30, 2003 Order for the filing of condition compliance plans should also be acceptable.

(6) *Reopeners.*

In its April 30, 2003 Order, the Department determined that various follow-up studies should be conducted to evaluate the effectiveness of the facilities and other measures required under the terms of the Order to meet water quality standards. Among the required studies were: a study or studies to determine the effectiveness of the upstream eel passage facilities required by Condition 3; a study to determine the exact timing of the operational measures (i.e., generation shutdown) to provide downstream eel passage as required by Condition 4; a study or studies to determine the effectiveness of the upstream and downstream anadromous fish passage facilities required by Condition 5; and a study or studies to determine the effectiveness of the spillage or, other measures required by Condition 6.

In its April 30, 2003 Order, the Department also included conditions regarding review and action by the Department based on the results of the required studies. Specifically, the April 30, 2003 Order provides that, after reviewing the appropriate study results, and after notice to the applicant and opportunity for hearing, the Department reserves the right to:

- Require reasonable changes in the design and/or operation of the upstream eel passage facilities installed pursuant to Condition 3 as may be deemed necessary to effectively pass eels upstream through the projects;

- Require changes in the timing of the operational shutdowns required by Condition 4 as may be deemed necessary to effectively pass eels downstream through the projects;
- Require reasonable changes in the design and/or operation of the upstream and downstream anadromous fish passage facilities installed pursuant to Condition 5 as may be deemed necessary to effectively pass anadromous fish upstream and downstream through the projects; and
- Reopen and modify the terms of the certification to require reasonable changes in the design and/or operation of the projects as may be deemed necessary to meet Class B dissolved oxygen standards in the river from Dundee Dam to Sacarrappa [sic] Dam under dry weather conditions.

The appellant has not presented any persuasive arguments or supplemental evidence calling into question the permissibility of the Department's "reopener" conditions.

Warren essentially argues that the Department has no authority to unilaterally modify the terms of its certification following the issuance of a FERC license.

However, as Warren has acknowledged, the terms and conditions of a state's 401 certification are binding on FERC and must become conditions of any FERC license, pursuant to Section 401(d) of the Clean Water Act. This includes certification conditions that allow for future modification of the terms of the certification based on the results of required effectiveness studies. Therefore, there is no conflict between FERC's

licensing authority and the Department's authority to issue conditional certifications. FERC has issued numerous licenses incorporating similar conditions imposed in water quality certifications issued by the DEP.

Furthermore, Warren has an obligation to demonstrate that the facilities installed and the operational measures implemented at a project are in fact sufficient to meet water quality standards. By Warren's argument, if it built a fishway but the fishway didn't work, the Department would have no legal authority to require that Warren modify the fishway so that it would work. This is an unreasonable outcome that is inconsistent with the Department's responsibility to ensure that water quality standards are met.

Finally, the Department's conditions stipulate that any decision by the Department to modify project facilities or operation must be preceded by the Department's review of the results of an approved effectiveness study and by notice to Warren and the opportunity for a hearing. Moreover, any decision by the Department to modify project facilities or operation based on the results of effectiveness studies constitutes a final agency action that is subject to administrative and judicial appeal. These procedural safeguards will ensure that the reopeners in the certification will be fairly and reasonably applied.

The requirement that effectiveness studies be conducted, and that facilities and/or project operation be modified based on the results of these studies, is a practice (often referred to as "adaptive management") that has long been employed by DEP, FERC and numerous other regulatory agencies, and that has worked well for both the

agencies and the regulated community. If studies show that a particular facility (for example, a fishway) is working as intended (that is, it is passing the required numbers of fish in an efficient and effective manner), then the relevant regulatory condition is satisfied and no changes will be made to the facility. However, if studies show that particular facility is not sufficient to satisfy the relevant regulatory condition (for example, a fishway is not passing the required numbers of fish), then changes must be made in the facility so that it will work as intended.

Moreover, the use of reopener clauses in FERC license have been upheld by the courts. *See Wisconsin Public Service Corp. v. FERC*, 32 F.3d 1165 (7th Cir. 1994) (upholding reopener in FERC license allowing Secretaries of Interior or Commerce to prescribe fishways if and when they are needed in the future). Without the use of reopener clauses, the DEP would have to act on incomplete information, requiring – especially in light of the fact that the license term will be 30 to 50 years – that the Department take a more conservative and inflexible approach to licensing. This could mean requiring costly mitigation measures that might have been shown, by appropriate studies, to be unnecessary.

(7) *Designated Use of Hydroelectric Power Generation.*

The waters of the Presumpscot River are variously classified as Class A, B, C and GPA waters. Under Maine's Water Classification Program, 38 MRSA Sections 464-469, these waters shall be suitable for the designated use of, among other things, hydroelectric power generation.

In its April 30, 2003 Order, the Department determined that the minimum bypass flows, spillage flows, and fish passage facilities required by the Order will reduce the average annual generation of the five combined projects from 40.5 million to 34.5 million kilowatt-hours of electricity. The Department also determined that, in view of the evidence on the record, there is a reasonable assurance that the proposed operation of the projects, as conditioned by the Order, will be adequate to ensure that the project waters are suitable for the designated use of hydroelectric power generation.

The appellant has not presented any persuasive arguments or supplemental evidence calling into question the Department's determinations regarding power generation. In addition, the appellant has not presented any persuasive arguments or supplemental evidence demonstrating that the Department's decision would mandate nonattainment of a designated use in violation of the State's antidegradation policy.

Warren's arguments are that the conditions of the Department's Order will result in a loss of hydroelectric power generation and will make the projects uneconomic to operate. Hydroelectric power generation, however, is just one of the several designated uses that must be protected in the subject waters under the Water Classification Law. All parts of the statute must be read together and the Department is not free to disregard one designated use in favor of another. *Rubin v. Board of Environmental Protection*, 577 A.2d 1189, 1192 (Me. 1990) (statute must be interpreted in a way that preserves the meaning of all its parts). Thus, it is often the case in making permitting and certification decisions, as it is

here, that no single designated use – be it recreation in and on the water, fishing, hydroelectric power generation, or habitat for fish and other aquatic life – can be maximized, due to the impacts on the other designated uses. In the case of the relicensing of a hydro project, this may mean, as here, that the project facilities and/or operation deemed necessary to meet other water quality standards will result in some loss of generation.

In addition, the most expensive certification requirement – the building of upstream anadromous fish passage facilities – is contingent on passage being available at the Cumberland Mills Dam and the passage of specified numbers of fish above the Saccarappa Project. Thus, it cannot be said with any certainty when, or if, fish passage will be required at any of the Presumpscot River Projects. It follows that it cannot be said with any certainty that the projects will become uneconomic in the future. And even if a particular project does become uneconomic for Warren, the costs of complying with the requirements of the certification will be only one factor determining the economic viability of the project.

(8) *Fishway Prescription.*

In a May 1, 2003 letter transmitting its April 30, 2003 certification decision to FERC, the Department included the following paragraph:

"With respect to downstream eel passage, we have concluded that the applicant's proposal for providing downstream passage at the projects (suspending generation for 4 hours a night for 4 weeks during the annual downstream eel migration season) should be adequate for eel passage.

However, the U.S. Department of Interior's fishway prescription for the projects includes a stipulation that generation be suspended for 8 hours a night for 8 weeks a year to protect downstream migrating eels. We understand that this prescription is binding on FERC in the relicensing process. While we do not believe the longer shutdown periods specified by Interior are justified, we do not see any conflict between the provisions of our certification and the more stringent downstream eel passage provisions prescribed by Interior."

Warren objects to the Department's conclusion that there is no conflict between the Department's downstream eel passage condition and Interior's downstream eel passage prescription. Warren argues that the longer shutdown advocated by Interior would further reduce the annual power generation of the projects, thus jeopardizing the designated use of hydropower generation.

Warren, however, misconstrues the nature of the statement to which it objects. Any statements made by the Department in its letter to FERC are not part of the certification and constitute the Department's opinion only; and do not constitute final agency action subject to administrative or judicial appeal. Even if this statement was reviewable, the statement is correct given that, under the Federal Power Act, the States' power to condition a FERC license through its water quality certification authority does not in any way limit the Department of the Interior's prescriptive authority.

(9) *Fishery Management Plan.*

In its April 30, 2003 Order, the Department determined that the Presumpscot River historically supported self-sustaining populations of various anadromous fish species, and that, over time, these fish were extirpated from the river by the construction of dams that blocked passage and by pollution. The Department also determined that the State's fisheries agencies had developed a draft plan for the restoration of various anadromous fish to the river basin, and that the plan included the following order-of-magnitude estimates of annual anadromous fish production potential in the river basin: 73,900 American shad; 450,200 blueback herring; 147,700 alewife; and 386 Atlantic salmon. Finally, the Department determined that the phased installation of upstream and downstream anadromous fish passage facilities at each of the projects dams is necessary to ensure that the project waters will be suitable for the designated uses of fishing and habitat for fish, and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters, subject to the other provisions of the order.

The appellant has not presented any persuasive arguments or supplemental evidence calling into question the basis for the Department's determination regarding the need for anadromous fish passage at the project dams.

Warren argues that the Department cannot and should not include substantial new conditions requiring fish passage based only on a draft fishery management plan that has not undergone public review and is not final.

The draft plan, however, was not, as Warren contends, the "basis" on which the fish passage conditions were imposed. The plan was one piece of information, among others, that the Department considered in making its determination that certain fish passage conditions were necessary to meet water quality standards. Moreover, to the extent that Warren implies that a final fishery management plan is necessary before the Department may impose fish passage conditions in a certification, it is not correct as a matter of law. There is nothing in statute or regulation that limits the Department's authority to require fish passage in order to meet water quality standards to those instances where a final fishery management plan has been adopted by the relevant state agency(ies) through a public process. Indeed, over the years, many fishways have been required by the Department and constructed and operated by hydropower project owners on rivers where no formal fishery management plan has been adopted.

Taking Warren's argument to its logical extension, no fishways could be required anywhere by DEP (or, by the state's own fisheries agencies) unless a final fishery management plan had been adopted, even though (1) the state's fisheries agencies are already charged under law with restoring sea-run fish to their historic habitat, and (2) the DEP is already charged under law with restoring the chemical, physical and biological integrity of the State's waters. Such an argument has no legal basis and could limit the restoration of sea-run fish to Maine's waters and the attainment of water quality standards in Maine's waters.

Based on the above Findings of Fact, the Board concludes that:

1. The appellant has standing and has filed a timely appeal.

2. The appellant has not presented persuasive arguments or supplemental evidence that would support overturning or modifying the Department's April 30, 2003 water quality certification for the Presumpscot River Hydro Projects.

THEREFORE, the Board AFFIRMS the Department Order approving the applications of S.D. WARREN COMPANY for Water Quality certification for the continued operation of the Presumpscot River Hydro Projects, and DENIES the appeal of S.D. WARREN COMPANY to overturn or modify that Order. The findings, conclusions and conditions of Department Order #L-19713-33-E-N, #L-19714-33-E-N, #L-19715-33-E-N, #L-19716-33-E-N, and #L-19717-33-E-N dated April 30, 2003 are adopted by the Board and incorporated herein.

DONE AND DATED AT AUGUSTA, MAINE, THIS 2nd DAY OF October, 2003.

BOARD OF ENVIRONMENTAL PROTECTION

BY: /s/ Richard E. Wardwell
Richard E. Wardwell, Chair

PLEASE NOTE ATTACHED SHEET FOR BOARD RECONSIDERATION AND JUDICIAL REVIEW PROCEDURES

[LOGO] STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATE HOUSE STATION 17 AUGUSTA, MAINE 04333

DEPARTMENT ORDER

IN THE MATTER OF

S.D. WARREN COMPANY	)	MAINE WATER
Gorham, Windham, and	)	QUALITY
Westbrook Cumberland County	)	PROGRAM;
PRESUMPSCOT RIVER	)	FEDERAL CLEAN
HYDRO PROJECTS	)	WATER ACT
#L-19713-33-E-N (Dundee)	)	WATER QUALITY
#L-19714-33-E-N (Gambo)	)	CERTIFICATION
#L-19715-33-E-N (Little Falls)	)	
#L-19716-33-E-N (Mallison Falls)	)	
#L-19717-33-E-N (Saccarappa)	)	

Pursuant to the provisions of 38 MRSA Section 464 *et seq.* and Section 401 of the Federal Water Pollution Control Act ("Clean Water Act"), the Department of Environmental Protection has considered the applications of S.D. WARREN COMPANY with their supportive data, agency comments, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. APPLICATION SUMMARY

a. *Applications*. S.D. Warren Company proposes the continued operation of the Dundee, Gambo, Little Falls, Mallison Falls, and Saccarappa Hydroelectric Projects (collectively, the Presumpscot River Projects), located on the Presumpscot River in the Towns of Gorham and Windham and the City of Westbrook, Cumberland County, Maine.

b. *Existing Project Features*. The five existing projects consist of five contiguous dams, impoundments,

powerhouses, and appurtenant facilities (see Exhibit 1), as described below.

Dundee Project. The Dundee Project, located at River Mile 21.9, consists of a 1,492-foot-long, 50-foot-high concrete dam with earthen abutments and two-foot-high spillway flashboards, a powerhouse integral with the dam containing three turbine-generator units with a total rated generating capacity of 2,400 kW, and a 1,075-foot-long tailrace channel formed by a natural earth and bedrock berm (see Exhibit 2).

The Dundee Dam creates a 197-acre impoundment with a normal full pond elevation of 187.22 feet (USGS datum) that extends 1.7 miles upstream to the tailwaters of the North Gorham Project, which is owned and operated by FPL Energy Maine Hydro LLC.

The Dundee Project creates a 1,075-foot-long bypass reach between the dam and the downstream end of the tailrace channel. The lower 200 feet of the bypass reach is backwatered by the downstream Gambo Project impoundment.

Gambo Project. The Gambo Project, located at River Mile 18.6, consists or a 300-foot-long, 24-foot-high concrete dam with 16-inch-high spillway flashboards, a 50-foot-long headgate structure, 737-foot-long concrete-lined intake power canal, and a powerhouse containing four turbine-generator units with a total rated generating capacity of 1,900 kW (see Exhibit 3).

The Gambo Dam creates a 151-acre impoundment with a normal full pond elevation of 135.13 feet (USGS datum) that extends upstream 3.3 miles to the tailwaters of the Dundee Project.

The Gambo Project creates a 300-foot-long bypass reach between the dam and the powerhouse tailwaters. The bypass reach is entirely free flowing.

Little Falls Project. The Little Falls Project, located at River Mile 16.9, consists of a 310-foot-long, 14-foot-high L-shaped concrete and masonry dam with 2-foot-high flashboards, and a powerhouse integral with the dam containing four turbine-generator units with a total rated generating capacity of 1,000 kW (see Exhibit 4).

The Little Falls Dam creates a 29-acre impoundment with a normal full pond elevation of 108.7 feet (USGS datum) that extends upstream 1.7 miles to the tailwaters of the Gambo Project.

The Little Falls Project creates a 300-foot-long bypass reach between the upper section of the dam and the powerhouse tailwaters. The lower 100 feet of the bypass reach is backwatered by the project tailwaters.

Mallison Falls Project. The Mallison Falls Project, located at River Mile 16.4, consists of a 14-foot-high, 358-foot-long concrete, masonry and cut granite diversion dam without flashboards, a 70-foot-long headgate structure, a 675-foot-long bedrock-lined intake power canal, and a powerhouse containing two turbine-generator units with a total rated generating capacity of 800 kW (see Exhibit 5).

The Mallison Falls Dam creates an 8-acre impoundment with a normal full pond elevation of 90.6 feet (USGS datum) that extends upstream 0.5 miles to the tailwaters of the Little Falls Project.

The Mallison Falls Project creates a 675-foot-long bypass reach between the dam and the powerhouse tailwaters. The lower 375 feet of the bypass reach is backwatered by discharges from the Mallison Falls powerhouse and by the downstream Saccarappa Project impoundment.

Saccarappa Project. The Saccarappa Project, located at River Mile 11.3, consists of two 10 to 12-foot high concrete diversion dams without flashboards that are separated by an island, a 60-foot-long headgate structure, an 80-foot-long concrete-lined forebay, a powerhouse containing three turbine-generator units with a total rated generating capacity of 1,350 kW, and a 345-foot-long bedrock-lined tailrace channel formed by a 33-foot-high concrete guard wall (see Exhibit 6).

The Saccarappa Dam creates an 87-acre impoundment with a normal full pond elevation of 69.95 feet (USGS datum) that extends upstream 5.0 miles to the tailwaters of the Mallison Falls Project.

The Saccarappa Project creates two bypass reaches measuring 475 and 390 feet-long between the two diversion dams and the downstream end of the tailrace channel. The bypass reaches are entirely free-flowing.

c. *Construction History*. All five existing projects were constructed in the early 1900's. However, dams have existed at some project locations, including Saccarappa and Mallison Falls, for over 250 years.

d. *Existing Project Operation*. The five projects are operated in a run-of-river mode, with outflow being approximately equal to inflow on an instantaneous basis except during flashboard failure or

replacement. Under normal operating conditions, impoundment levels are maintained within one foot of full pond. However, the evidence in the record (FERC FEIS, June 2002) indicates that impoundment drawdowns in excess of two and three feet have occurred, albeit infrequently, at several of the projects.

There are currently no required minimum flow releases to the bypass reaches at any of the five projects. As a result, the bypass reaches receive only varying amounts of leakage and spillage, with minimum leakage flows ranging from 2 to 33 cubic feet per second (cfs).

The five projects utilize flows provided from Sebago Lake by S.D. Warren's Eel Weir Project and by various minor tributaries to the Presumpscot River downstream from Sebago Lake. Flows from Sebago Lake are currently regulated under a FERC-approved lake level management plan.

The five projects are operated continuously to provide electricity that is used at S.D. Warren's Westbrook paper mill.

e. *Proposed Operation/Protection Mitigation and Enhancement Measures*. The applicant proposes the following operational and non-operational measures for the protection, mitigation and enhancement of public resources:

Dundee

- Continue run-of-river operation and daily headpond monitoring.
- Provide specified minimum flow releases into the bypass reach.

- Avoid impoundment drawdowns for maintenance during May and June.
- Implement impoundment refill procedures after drawdowns.
- Install and operate upstream eel passage facilities and institute operational measures to provide downstream eel passage.
- Implement a Recreation Facility Enhancement Plan, consisting of: rerouting, stabilizing and maintaining the existing canoe portage trail; seeking an easement to provide walk-in angler access to the bypass reach; and investigating whether an existing access easement can be altered to permit fishery agency access for stocking purposes.
- Provide for protection and mitigation of adverse effects on identified archaeological sites.

Gambo

- Continue run-of-river operation and daily headpond monitoring.
- Provide specified minimum flow releases into the bypass reach.
- Avoid impoundment drawdowns for maintenance during May and June.
- Implement impoundment refill procedures after drawdowns.
- Institute operational measures to provide downstream eel passage.
- Implement a Recreation Facility Enhancement Plan, consisting of: enhancing and maintaining the existing informal canoe portage trail; developing

an interpretive sign to explain the history of the Oriental Powder Mill Complex; providing walk-in angler access to the bypass reach; developing parking and signs for carry-in boat access at the portage take-out location; and assisting the Town of Gorham in regrading and enhancing the Gambo Road approach to the former bridge area immediately upstream from the dam.

- Provide for protection and mitigation of adverse effects on identified archaeological sites.

Little Falls

- Continue run-of-river operation and daily headpond monitoring.
- Avoid impoundment drawdowns for maintenance during May and June.
- Implement impoundment refill procedures after drawdowns.
- Institute operational measures to provide downstream eel passage.
- Implement a Recreation Facility Enhancement Plan, consisting of: establishing and maintaining a canoe portage trail; assisting Gorham Trails in developing parking, signage, and access for a carry-in boat launch at the Gorham Land Trust Property off of Tow Path Road; and donate approximately 0.8 acres of land on the island located off-shore of the Hawkes Property to the Gorham Land trust.
- Provide for protection and mitigation of adverse effects on identified archaeological sites.

Mallison Falls

- Continue run-of-river operation and daily headpond monitoring.
- Provide specified minimum flow releases into the bypass reach.
- Avoid impoundment drawdowns for maintenance during May and June.
- Implement impoundment refill procedures after drawdowns.
- Institute operational measures to provide downstream eel passage.
- Implement a Recreation Facility Enhancement Plan, consisting of: establishing and maintaining a formal canoe portage trail; providing signs for parking and access at the existing carry-in boat access site at the project powerhouse; developing parking, signage, and access for a carry-in boat access site above the project dam; seeking permission from the Department of Transportation and the Town of Gorham to provide a roadside pullout and carry-in boat access site next to the bridge abutment above the project dam; and. continuing to seek an easement or other opportunities to provide walk-in angler access to the bypass reach.
- Provide for protection and mitigation of adverse effects on identified archaeological sites.

Saccarappa

- Continue run-of-river operation and daily headpond monitoring.
- Avoid impoundment drawdowns for maintenance during May and June.

- Implement impoundment refill procedures after drawdowns.
- Institute operational measures to provide downstream eel passage.
- Implement a Recreation Facility Enhancement Plan, consisting of: seeking an easement to establish parking, signage, and access for a portage take-out and carry-in boat launch site on the project impoundment.
- Provide for protection and mitigation of adverse effects on identified archaeological sites.

2. JURISDICTION

The proposed continued operation of the Presumpscot River Projects qualifies as an "activity . . . which may result in (a) discharge into the navigable waters (of the United States)" pursuant to the Clean Water Act (CWA), 33 USC 1251 *et seq*. Section 401 of the CWA requires that any applicant for a federal license or permit to conduct such an activity obtain a certification that the activity will comply with applicable State water quality standards. State law authorizes the Department to issue a water quality certification pursuant to Section 401 of the CWA when the standards of classification of the water body and the State's antidegradation policy are met. 38 M.R.S.A. §464(F)(3).

The Presumpscot River Projects were originally licensed by the Federal Energy Regulatory Commission in separate actions between October 31, 1979 and September 17, 1981. The original expiration dates for these licenses ranged from October 1, 1999 to September 1, 2001. In 1996, at S.D. Warren's request, the licenses were modified to all expire on January 26, 2001, in order to facilitate a coordinated review at relicensing.

On January 22, 1999, S.D. Warren filed an Application for Subsequent License with the Federal Energy Regulatory Commission for each of the Presumpscot River Projects, including the Dundee Project (FERC No. 2942), the Gambo Project (FERC No. 2931), the Little Falls Project (FERC No. 2941), the Mallison Falls Project (FERC No. 2932), and the Saccarappa Project (FERC No. 2897).

The Department of Environmental Protection has been designated by the Governor of the State of Maine as the certifying agency for issuance of Section 401 water quality certification for all activities in the State not subject to Land Use Regulation Commission permitting and review. The Presumpscot River Projects are all located within organized municipalities that are not subject to LURC's regulatory jurisdiction. Therefore, the DEP is the certifying agency for the projects.

3. APPLICABLE WATER QUALITY STANDARDS

a *Classification*. The receiving waters that are or may be affected by the project are currently classified as follows:

- Presumpscot River, from the outlet of Sebago Lake to its confluence with the Pleasant River, excluding Dundee Pond – Class A. 38 MRSA Section 467(9)(A)(1) and (1-A).
- Dundee Pond – Class GPA, 38 MRSA Section 465-A.
- Presumpscot River, from its confluence with the Pleasant River to Saccarappa Falls – Class B. Further, there may be no new direct discharges to this segment after January 1, 1999. 38 MRSA Section 467(9)(A)(2) and (3).
- Presumpscot River, from Saccarappa Falls to tidewater – Class C. 38 MRSA Section 467(9)(A)(4).

b. *Designated Uses.* Class GPA, Class A, Class B, and Class C waters shall be of such quality that they are suitable for the designated uses of drinking water after disinfection; recreation in and on the water; fishing; industrial process and cooling water supply; hydroelectric power generation; navigation; and as habitat for fish and other aquatic life. The habitat of Class GPA and Class A waters shall be characterized as natural. The habitat of Class B waters shall be characterized as unimpaired. 38 MRSA Section 465(2)(A), 38 MRSA Section 465(3)(A), 38 MRSA Section 465(4)(A), and 38 MRSA Section 465-A(1)(A).

c. *Numeric Standards.* The numeric standards for the receiving waters are as follows.

Class GPA waters shall be described by their trophic state based on measures of the chlorophyll "a" content, Secchi disk transparency, total phosphorus content and other appropriate criteria. Class GPA waters shall have a stable or decreasing trophic state; subject only to natural fluctuations and shall be free of culturally induced algal blooms which impair their use and enjoyment. 38 MRSA Section 465-A(1)(B).

The dissolved oxygen content of Class A waters shall be not less than 7 parts per million or 75% of saturation, whichever is higher, and the aquatic life and bacteria content of these waters shall be as naturally occurs. 38 MRSA Section 465(2)(B).

The dissolved oxygen content of Class B waters shall be not less than 7 parts per million or 75% of saturation, whichever is higher, except that for the period from October 1st to May 14th, in order to ensure spawning and egg incubation of

indigenous fish species, the 7-day mean dissolved oxygen concentration shall not be less than 9.5 parts per million and the 1-day minimum dissolved oxygen concentration shall not be less than 8.0 parts per million in identified fish spawning areas. 38 MRSA Section 465(3)(B).

The dissolved oxygen content of Class C waters may be not less than 5 parts per million or 60% of saturation, whichever is higher, except that in identified salmonid spawning areas where water quality is sufficient to ensure spawning, egg incubation and survival of early life stages, that water quality sufficient for these purposes must be maintained. 38 MRSA Section 465(4)(B).

d. *Narrative Standards.* The narrative standards for the receiving waters are as follows.

There may be no new direct discharge of pollutants into Class GPA waters. Discharges into these waters licensed prior to January 1, 1986 are allowed to continue only until practical alternatives exist. 38 MRSA Section 465-A(1)(C)

The habitat and aquatic life criteria of Class GPA are deemed to be met in an existing impoundment classified as GPA if the impounded waters, at a minimum, satisfy Class C aquatic life criteria (the receiving waters shall be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community), provided that, where the actual quality of the impounded waters attains any more stringent characteristic or criteria, that existing water quality must be maintained and protected. 38 MRSA Section 464(9).

New direct discharges to Class A waters are permitted only if, in addition to satisfying all other requirements, the effluent is equal to or better than the existing water quality of the receiving water. Discharges into these waters licensed prior to January 1, 1986 are allowed to continue only until practical alternatives exist. 38 MRSA Section 465(2)(C).

For the purposes of water quality certification of the hydropower project at the Dundee Dam, the habitat characteristics and aquatic life criteria of Class A are deemed to be met in the waters immediately downstream and measurably affected by that project if Class B designated uses and narrative standards are met. 38 MRSA Section 467(9)(A)(1-A).

Discharges to Class B waters shall not cause adverse impact to aquatic life in that the receiving waters shall be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community. 38 MRSA Section 465(3)(C).

The habitat characteristics and aquatic life criteria of Classes A and B are deemed to be met in existing impoundments classified as A or B if the impounded waters satisfy Class C aquatic life criteria (the receiving waters shall be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community), provided that any reasonable changes are implemented that do not significantly affect existing energy generation capability and would result in improvement in the habitat and aquatic life of the impounded waters, and further provided that, when the

actual quality of the impounded waters attains any more stringent habitat characteristic or aquatic life criteria than required under Class C standards, that water quality must be maintained and protected. 38 MRSA Section 464(10).

Discharges to Class C waters may cause some changes to aquatic life, provided that the receiving waters shall be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community. 38 MRSA Section 465(4)(C).

e. *Antidegradation*. The Department may only approve water quality certification if the standards of classification of the waterbody and the requirements of the State's antidegradation policy will be met. The Department may approve water quality certification for a project affecting a waterbody in which the standards of classification are not met if the project does not cause or contribute to the failure of the waterbody to meet the standards of classification, 38 MRSA § 464(4)(F).

4. DUNDEE POND WATER QUALITY AND TROPHIC STATE

   a. *Existing Conditions.* Dundee Pond is an artificial impoundment created by construction of the Dundee Dam. The land area around the pond is densely forested, with limited shoreline development. There are no known discharges of pollutants to the pond, which drains an area of about 445 square miles. Almost all of the drainage (441 square miles) lies above the Sebago Lake outlet dam.

b. *Monitoring Data.* The applicant has conducted ambient water quality monitoring in Dundee Pond in accordance with the DEP's Lake Trophic State Sampling Protocol. Biweekly sampling conducted during a five-month period (June to November) in 1997 included dissolved oxygen and temperature profiles and Secchi disk transparencies. In addition, epilimnetic core samples were taken and analyzed for total phosphorus, Chlorophyll *a*, color, laboratory pH; and total alkalinity.

Analysis of the data indicates that Dundee Pond is a mesotrophic lake, with low to moderate levels of Chlorophyll *a* and total phosphorus. Additionally, the data do not indicate any evidence of increasing pollutant loading to the pond.

c. *Applicant's Proposals.* The applicant proposes to continue run-of-river operation and daily headpond monitoring and to avoid drawdowns of the pond for maintenance during May and June.

d. *Discussion.* The applicant's proposals will be adequate to ensure that the trophic state of Dundee Pond remains stable.

5. FISH RESOURCES AND FISHING

a. *Existing Conditions.* The Presumpscot River supports self-sustaining populations of resident warmwater fish species and the American eel. The current warmwater recreational fishery includes smallmouth and largemouth bass, yellow perch, and chain pickerel. The American eel is a catadromous fish that spawns at sea and returns to freshwater lakes and ponds to grow to adulthood.

A coldwater fishery exists in the bypass and tailwater segments of the river down to the Mallison Project. Coldwater species include brown trout, brook trout, and landlocked salmon, all of which are supported primarily by annual stocking. The river does not currently support self-sustaining populations of coldwater fish.

Currently, there are no fish passage facilities in place at any of the eight dams on the river between Sebago Lake in Standish and tidewater in Falmouth. As a result, none of the migratory anadromous species of fish native to the river are currently found in the project areas.

Finally, the lack of minimum flows in the bypass reaches at the projects severely limits the value of these reaches as habitat for various fish species.

b. *Historic Conditions.* Based on historical records, the Presumpscot River throughout the project areas supported self-sustaining populations of various anadromous fish species, including Atlantic salmon, American shad, river herring (alewife and blueback herring), rainbow smelt, and striped bass. Anadromous fish spawn in freshwater and return to the sea to grow to adulthood. Over time, all anadromous fish were extirpated from the river by the construction of dams that blocked passage and by pollution.

c. *Studies.* In 1997, the applicant conducted a Baseline Fisheries Study, which examined species composition and relative abundance, smallmouth bass spawning, growth rates, condition factors, and types of available habitat in the project impoundments and tailwater areas. A total of 17 species were collected during the baseline study,

with the most abundant species being pumpkinseed, smallmouth bass, American eel, and several species of shiner. Fish habitat diversity and quality were found to be generally higher, and more suitable smallmouth bass habitat was found to be available, in the Dundee and Gambo impoundments as compared to the three downstream impoundments. However, two independent analyses (Berger, 2001 and Northern Ecological Associates, 2001) indicate that substrates in the Little Falls, Mallison Falls and Saccarappa impoundments are not as limited as suggested in the applicant's study.

Also in 1997, the applicant conducted a two-phase Habitat and Flow Study of the bypass reach below each of the five project dams. Phase I involved a habitat mapping survey to characterize the aquatic habitat available in the bypass reaches. Phase II entailed flow demonstration assessments to evaluate the minimum flows needed to meet fisheries and other water quality management goals in the bypass reaches found to contain high quality habitat.

The results of the Phase I study indicated that the bypass reaches of the Dundee, Gambo, and Mallison Falls Projects provide relatively high quality habitat with the greatest potential for supporting a limited season trout fishery maintained by annual stocking. The subsequent Phase II study involved rating the suitability of the aquatic habitat in these bypass reaches under various flows.

Finally, in 2000, the applicant conducted an upstream eel migration study at the project dams. This study was conducted to determine the upstream migration patterns, migratory success,

and population of eels occurring within the project waters. Eels were found at each project, indicating that, even without fish passage facilities, some migrating juvenile eels (elvers) were able to migrate upstream over or around some or all of the dams on the river.

d. *Fishery Management Plans*. In December 2001, the Maine Department of Marine Resources, Department of Inland Fisheries and Wildlife, and Atlantic Salmon Commission jointly issued a "Draft Fishery Management Plan For the Presumpscot River Basin."

Under the Draft Plan, management goals include: providing migratory routes and habitat for catadromous American eel and various anadromous species including river herring, American shad, striped bass, and Atlantic salmon, and possibly Atlantic sturgeon, rainbow smelt, sea-run brook trout, sea-run brown trout, and tomcod; sustaining the production of existing riverine species and targeted anadromous and catadromous species; promoting existing and potential commercial and sport fisheries for anadromous, catadromous, and resident species; establishing a recreational fishery for stocked trout in the mainstream; and managing specific tributaries for the production of wild brook trout.

The Draft Plan calls for restoration of anadromous species to occur in two phases, allowing the fisheries agencies to assess potential interactions between resident and anadromous species and changes in fishing opportunities. Phase I involves restoring anadromous fish up to the base of the Gambo Dam. If the three fisheries agencies agree, Phase II will involve restoring

anadromous fish from Gambo dam up to the base of the Eel Weir (Sebago Lake) Dam.

Finally, under the Draft Plan, the fisheries agencies have provided the following order-of-magnitude estimates of annual anadromous fish production potential in the river basin; 73,900 American shad; 450,200 blueback herring; 147,700 alewife; and 386 Atlantic salmon. These estimates were obtained by multiplying fish production per unit area for each species by the total number of area units of aquatic habitat in the river. No production estimates for American eel have been made.

e. *Applicant's Proposals.* The applicant proposes to continue run-of-river operation and daily headpond monitoring and to avoid drawdowns of the project impoundments for maintenance during May and June.

The applicant also proposes the following procedures for refilling the project impoundments after any drawdowns:

- If allowed under the FERC-approved Sebago lake level management plan, temporarily increase outflows from Sebago Lake to refill the impoundments while maintaining flows from each project as required by the flow/temperature curve component of the approved lake level management plan.
- If increased outflows from Sebago Lake are not allowed under the approved lake level management plan, use a maximum of 25% of the outflow from Sebago Lake to refill the impoundments while maintaining flows from each project equal to at least 75% of the outflow from Sebago Lake.

The applicant also proposes to provide minimum flow releases into the bypass reach at each dam. Specifics on the length, leakage flows, and characteristics of the five bypass reaches, as well as the applicant's minimum flow proposals, are given in the following table:

Presumpscot River Bypass Flows

PROJECT	LENGTH OF BYPASS	EXISTING LEAKAGE FLOW	BYPASS CHARACTERISTICS	S.D. WARREN BYPASS FLOW PROPOSALS*
Dundee	1075 ft	5 cfs	Lower 200 ft of bypass is backwatered by Gambo Dam	57 cfs May 1 – Sept 30 30 cfs April & Oct 20 cfs Nov 1 – Mar 31
Gambo	300 ft	33 cfs	Bypass is entirely free-flowing; existing leakage is from a sluice gate	40 cfs Apr 1 – Oct 31 30 cfs Nov 1 – Mar 31
Little Falls	300 ft	26 cfs	Lower 100 ft of bypass is backwatered by the project tailwaters	Maintain existing leakage
Mallison Falls	675 ft	2 cfs	Lower 375 ft of bypass is backwatered by project tailwaters	60 cfs May 1 – Sept 30 40 cfs Apr & Oct 20 cfs Nov 1 – Mar 31
Saccarappa	East: 475 ft West: 390 ft	5 cfs 8 cfs	Both bypasses are entirely free-flowing	Maintain existing leakage

* Dundee, Gambo and Mallison Falls bypass flows are per S.D. Warren's January 4, 2002 reply to agency comments on FERC DEIS.

The Applicant also proposes to install and operate upstream eel passage facilities at the Dundee Project and to institute operational measures at all five projects to provide downstream eel passage. These operational measures include suspending generation at all five projects for 4 hours per night for four one-week periods during the downstream eel migration season, which generally runs from mid August through the end of October. The applicant also proposes to conduct a 3-year study to determine the exact timing of the generation shutdown, so as to result in the greatest downstream eel passage benefit.

Finally, the applicant does not propose to install any upstream or downstream fish passage facilities for migrating anadromous fish.

f. *Agency Comments.* In comments dated September 23, 2002, the Department of Inland Fisheries and Wildlife (DIF&W) supports the minimum flow releases recommended in the FERC FEIS (June 2002). Specifically, DIF&W recommends adoption of the applicant's minimum flow proposals, as modified to increase winter (Nov 1 through March 31) bypass flows at the Gambo and Mallison Falls Projects to 40 cfs. DIF&W specifically notes that providing adequate minimum flows to the Dundee, Gambo, and Mallison Falls bypass reaches has the potential to produce a significant sport fishery for stocked trout close to the metropolitan Portland area.

In comments dated September 30, 2002, and supplemented December 2, 2002, the Department of Marine Resources (DMR) also supports the minimum flow releases recommended in the FERC FEIS (June 2002). DMR also recommends that upstream eel passage facilities be installed

at all five project dams within two years of licensing, and that generation be suspended at all five project dams for 8 hours per night for eight one-week periods during the downstream eel migration season beginning within 30 days of licensing. In addition, DMR supports the applicant's proposal to conduct a 3-year study to determine the exact timing of the generation shutdown, so as to result in the greatest downstream eel passage benefit. Finally, DMR recommends that upstream and downstream passage facilities for anadromous fish species be provided as follows:

Upstream Passage

Saccarappa Project	Phase I	Denil "fish ladder" designed to pass 18,000 American shad, 109,000 blueback herring, and 273 Atlantic salmon annually, and including a counting, trapping and sorting facility, to be operational no later than 2 years after passage is available at the downstream Cumberland Mills Dam.
	Phase II	Convert or replace Phase I Denil fish ladder with a fish lift designed to pass 58,000 American shad, 353,000 blueback herring, and 426 Atlantic salmon annually, and including a counting, trapping and sorting facility,

		to be operational no later than 2 years after restoration begins above Gambo Dam and the capacity of the Phase I fish ladder is reached.
Mallison Falls Project	Phase I	Denil "fish ladder" designed to pass 4,200 American shad, 26,000 blueback herring; and 32 Atlantic salmon annually, and including a counting, trapping and sorting facility, to be operational no later than 2 years after passage of 2,960 American shad or 18,020 blueback herring in any single year at the Saccarappa Project.
	Phase II	Convert or replace Phase I Denil fish ladder with a fish lift designed to pass 44,000 American shad, 270,000 blueback herring, and 185 Atlantic salmon annually, and including a counting, trapping and sorting facility, to be operational no later than 2 years after restoration begins above Gambo Dam and the capacity of the Phase I fish ladder is reached.
Little Falls Project	Phase I	Denil "fish ladder" designed to pass 3,100

		American shad, 19,000 blueback herring, and 15 Atlantic salmon annually, and including a counting, trapping and sorting facility, to be operational no later than 2 years after passage of 2,960 American shad or 18,020 blueback herring in any single year at the Saccarappa Project.
	Phase II	Convert or replace Phase I Denil fish ladder with a fish lift designed to pass 43,000 American shad, 263,000 blueback herring, and 168 Atlantic salmon annually, and including a counting, trapping and sorting facility, to be operational no later than 2 years after restoration begins above Gambo Dam and the capacity of the Phase I fish ladder is reached.
Gambo Project	Phase I	No upstream fish passage requirements.
	Phase II	Fish lift designed to pass 40,000 American shad, 244,000 blueback herring, and 153 Atlantic salmon annually, and including a counting, trapping and sorting facility,

		to be operational no later than 2 years after passage of 620 American shad or 3,800 blueback herring in any single year at the Little Falls Project.
Dundee Project	Phase I	No upstream fish passage requirements.
	Phase II	Fish lift designed to pass 20,000 American shad, 122,000 blueback hearing, and 64 Atlantic salmon annually, and including a counting, trapping and sorting facility, to be operational no later than 2 years after passage of 4,020 American shad or 24,460 blueback herring in any single year at the Gambo Project.
Downstream Passage		
All Projects		Gated surface bypass, to be operational concurrent with the completion of upstream passage facilities at each project or within 2 years of notification of sustained upstream stocking of anadromous fish, whichever comes first.

Finally, in comments dated September 27, 2002 and January 24, 2003, the Atlantic Salmon Commission (ASC) supports the minimum flow

releases recommended in the FERC FEIS (June 2002) and recommends the same provisions for upstream and downstream passage facilities for anadromous fish as recommended by DMR (see above). However, ASC notes that the recommended minimum flows are based on studies that evaluated the habitat value of the bypass reaches for trout, not for salmon. Therefore, the ASC recommends that the adequacy of these minimum flows for Atlantic salmon spawning, egg incubation, and production of juvenile Atlantic salmon be evaluated upon completion of a habitat assessment by the ASC and a decision to initiate Atlantic salmon restoration in the Presumpscot River.

g. *NGO Comments*. Two non-governmental organizations (NGOs), American Rivers and Friends of the Presumpscot River, have participated in the regulatory process as interested parties and, in filings dated November 7, 2000, August 8, October 5, 2001, and September 30, 2002, have submitted comments and supplemental material for the record. In particular, the NGOs have provided primary source documents establishing that anadromous Atlantic salmon, American shad and alewive were indigenous throughout the full length of the Presumpscot River.

In their comments, the NGOs contend that it is illegal for DEP to issue water quality certifications for the five Presumpscot River Projects without specific, precise and enforceable upstream and downstream fishway requirements for each of the projects. The NGOs generally support the provisions for upstream and downstream fish passage facilities for eels and for anadromous fish as recommended by DMR.

h. *Discussion.*

i. *Project Operation and Bypass Flows*. There is a reasonable assurance that the applicant's proposals to maintain run of river operations will be adequate to ensure that the waters in the project impoundments and tailwater areas will be suitable for the designated uses of habitat for fish and for fishing and that all applicable numeric and narrative water quality standards for these waters will be satisfied, subject to the other provisions of this Order.

There is a reasonable assurance that the applicant's proposals for providing seasonally varied minimum flow releases in the Dundee bypass reach will be adequate to ensure that these waters will be suitable for the designated uses of habitat for fish and for fishing and that all applicable numeric and narrative water quality standards for these waters will be satisfied, subject to other provisions of this Order.

With respect to the Gambo bypass reach, habitat suitability for target species (brown trout and brook trout) is maximized at a flow of 40 cfs, and flows in the bypass reach must be sufficient to sustain the overwintering of trout in order to produce a significant sport fishery here. In view of the evidence in the record, year-round minimum flows of 40 cfs in the Gambo bypass reach will improve habitat conditions for trout species, and are necessary to ensure that these waters as will meet applicable water quality standards, subject to the other provisions of this Order. Specifically, there is a

reasonable assurance that a year-round minimum flow of 40 cfs in the Gambo bypass reach is necessary to ensure that these waters will be suitable for the designated uses of habitat for fish and for fishing, and that the identified waters will be of sufficient quality to support all species of fish indigenous to these waters.

With respect to the Mallison Falls bypass reach, flows in the bypass reach must be sufficient to sustain the over-wintering of trout in order to producer significant sport fishery here. In view of the evidence in the record, minimum flows of 60 cfs from May 1 through September 30 and 40 cfs from October 1 through April 30 in the Mallison Falls bypass reach will improve habitat conditions for trout species, and are necessary to ensure that these waters will meet applicable water quality standards, subject to the other provisions of this Order. Specifically, there is a reasonable assurance that minimum flows of 60 cfs from May 1 through September 30 and 40 cfs from October 1 through April 30 in the Mallison Falls bypass reach are necessary to ensure that these waters will be suitable for the designated uses of habitat for fish and for fishing and that the identified waters will be of sufficient quality to support all species of fish indigenous to these waters.

Finally, a future study should be conducted to evaluate the effectiveness of the approved minimum bypass flows in providing habitat for various life stages of Atlantic salmon in the bypass reaches in the event that active

Atlantic salmon restoration activities are initiated in the Presumpscot River.

ii. *Eel Passage*. With respect to upstream eel passage, there is evidence that at least some eels are currently migrating upstream past all five project dams, despite the lack of passage facilities. However, eel migration, and thus overall eel populations, would benefit from the installation of upstream passage facilities at each dam, because more eels will successfully pass the dams to reach Sebago Lake with fishways in place than without fishways. The applicant has not provided any convincing evidence to support its proposal that upstream eel passage be installed only at the Dundee Project. In view of the evidence in the record, the installation of upstream eel passage facilities at all five project dams will improve access to habitat for eels and is necessary to ensure that the project waters will meet applicable water quality standards, subject to the other provisions of this Order. Specifically, there is a reasonable assurance that the installation of upstream eel passage facilities at the project dams is necessary to ensure that the project waters will be suitable for the designated uses of fishing and habitat for fish, and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters. A follow-up study should be conducted to evaluate the effectiveness of these facilities in providing upstream passage for eels.

With respect to downstream eel passage, there is currently considerable uncertainty regarding the timing and duration of the

downstream migration of adult eels. Generally, eels have been found to migrate downstream at night near the bottom of the water column. As a consequence, traditional downstream passage facilities (usually, surface bypasses or weirs) are of limited value for eels. In addition, the downstream eel migration period has been found to average 8 weeks (range of from 2 to 13 weeks), with peak migration occurring over a 3 to 4 week period (range of from 1 to 5 weeks). The occurrence of peak downstream migration has also been found to be variable from hour to hour, week to week, and year to year. The shut down of generating facilities at night during the downstream eel migration season, often in combination with gate openings, has been demonstrated elsewhere to be an effective means of reducing turbine mortality and thus increasing the number of eels that successfully migrate downstream. However, DMR has not provided any convincing evidence that its recommended expansion of the applicant's proposed shutdown regime from 4 hours to 8 hours a night and from 4 weeks to 8 weeks a year is necessary to provide adequate downstream eel passage, particularly in view of the impact of the expanded shutdown on project generation. Finally, no other hydro project in the state is currently subject to DMR's proposed shut down regime. In view of the evidence in the record, there is a reasonable assurance that the applicant's proposals for downstream eel passage will be adequate to ensure that the project waters will be suitable for the designated uses of fishing and habitat for fish, and that the project waters will

be of sufficient quality to support all species of fish indigenous to these waters, subject to the other provisions of this Order. A follow-up study should be conducted, however, to evaluate the effectiveness of these operational measures in providing downstream passage for eels.

iii. *Anadromous Fish Passage.* With respect to upstream and downstream anadromous fish passage, there is convincing evidence in the record that the Presumpscot River historically supported natural populations of American shad, blueback herring, alewive and Atlantic salmon throughout the project areas. State fisheries agencies are developing a plan to restore these species to the river. Once upstream passage is available at the Cumberland Mills Dam, which is located at the applicant's Westbrook paper mill, the phased installation of anadromous fish passage facilities at each of the project dams will be necessary and appropriate to allow access for the target anadromous species to spawning and nursery habitat. Therefore, in view of the evidence in the record, the installation of upstream and downstream anadromous fish passage facilities at all five project dams will provide access to significant habitat for American shad, blueback herring, and Atlantic salmon and is necessary to ensure that the project waters will meet applicable water quality standards, subject to the other provisions of this Order. Specifically, there is a reasonable assurance that the installation of upstream and downstream anadromous fish passage facilities,

as set forth above, is necessary to ensure that the project waters will be suitable for the designated uses of fishing and habitat for fish and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters. However, given that it may be some time before passage is required, there should be flexibility in facility design specifications. In addition, a follow-up study should be conducted to evaluate the effectiveness of all facilities in providing passage for the target anadromous species.

6. AQUATIC HABITAT

a. *Existing Conditions.* Water levels and flows in the Presumpscot River are affected by the presence and operation of the project dams. The DEP uses the benthic macroinvertebrate community as an indicator of the general state of aquatic life for the purpose of attainment of water classification standards.

b. *Studies.* In 1997, the applicant conducted a study of the existing macroinvertebrate communities in the project impoundments. Sampling was conducted at six sites, staring below the Dundee Dam and ending in the Saccarappa Dam impoundment. Analysis of the sampling results using the DEP's linear discriminant model indicates that the sampled communities meet applicable Class A and B aquatic life standards, as to the numbers and diversity of species found.

Also in 1997, the applicant conducted a two-phase Habitat and Flow Study of the bypass reach below each of the five project dams. Phase I involved a habitat mapping survey to

characterize the aquatic habitat available in the bypass reaches. Phase II entailed flow demonstration assessments to evaluate the minimum flows needed to meet fisheries and other water quality management goals in the bypass reaches found to contain high quality habitat.

The results of the Phase I study indicated that the bypass reaches of the Dundee, Gambo, and Mallison Falls Projects provide relatively high quality habitat with the greatest potential for supporting a limited season trout fishery maintained by annual stocking, The subsequent Phase II study involved rating the suitability of the aquatic habitat in these bypass reaches under various flows.

Finally, on October 18, 2000, the applicant conducted a flow demonstration of various measured flows in the bypass reaches at the Dundee and Gambo Projects for DEP staff.

c. *Applicant's Proposals.* The applicant proposes to continue run-of-river operation and daily headpond monitoring and to avoid drawdowns of the project impoundments for maintenance during May and June.

The applicant also proposes to provide minimum flow releases into the bypass reach at each project dam, as described in Section 5(e) above.

d. *Discussion.* There must be both sufficient quality and quantity of habitat for aquatic organisms to meet aquatic life standards. The Department has found that, generally, flows providing wetted conditions in a weighted average of 3/4ths of the cross-sectional area of a river or stream, as measured from bank full conditions, are sufficient to meet aquatic life and habitat standards.

However, each waterway is different in terms of the value of various flows in providing, habitat for aquatic life, and conflicts may exist between the habitat needs of various resident aquatic organisms. As a result, on a case-by-case basis, the Department often establishes alternative flows based on identified site-specific conditions and data, where those alternative flows can be shown to meet all water quality standards. Such a case-by-case analysis of the bypass flows needed to meet aquatic life standards at the Presumpscot River Projects follows.

The bypass reaches at the project dams are of particular significance because they represent the only free-flowing waters in the Presumpscot River in the 15.4-mile-long stretch between the Eel Weir Powerhouse in Standish, located at the upstream limit of the North Gorham Project impoundment, and the Cumberland Mills Dam in Westbrook, located downstream from the Saccarappa Project.

There is a reasonable assurance that the applicant's proposals to maintain run-of-river operations will be adequate to ensure that the project impoundments will be suitable for the designated use of habitat for aquatic life and that all applicable numeric and narrative water quality standards for these waters will be satisfied; subject to the other provisions of this Order.

With respect to the Little Falls and Saccarappa bypass reaches, the bottom substrate is primarily ledge, with limited habitat that is suitable to support aquatic life. In view of these site-specific conditions, there is a reasonable assurance that the applicant's proposals for maintaining existing leakage flows to the Little Falls and Saccarappa

bypass reaches will be adequate to ensure that the identified waters will be suitable for the designated use of habitat for aquatic life and that all applicable numeric and narrative water quality standards for these waters will be satisfied, subject to the other provisions of this Order.

With respect to the Gambo bypass reach, habitat suitability for target fish species (brown trout and brook trout) decreases at flows above 40 cfs. However, only 42% of the bypass is wetted at a flow of 40 cfs. Increasing the bypass flow from 40 to 60 cfs increases the wetted area by 17% while reducing habitat suitability for target fish species by only 8%. Finally, substrate conditions here are suitable to support aquatic life during both winter and non-winter periods. In view of these site-specific conditions, there is a reasonable assurance that a year-round minimum flow of 60 cfs in the Gambo bypass reach will improve overall habitat conditions for macroinvertebrates and other aquatic species, including brook trout and brown trout, and is necessary to ensure that these waters will be suitable for the designated use of habitat for aquatic life and that the identified waters will be of sufficient quality to support all aquatic species indigenous to these waters without detrimental changes in the resident biological community, subject to the other provisions of this Order. A follow-up study should be conducted to document attainment of aquatic life standards.

With respect to the Dundee and Mallison Falls bypass reaches, the applicant's proposed 60 cfs minimum flow release during the May through September period meets or exceeds 75% wetted conditions in the bypass reaches and meets aquatic life and habitat standards. However,

providing this flow in October will benefit both macroinvertebrates and target fish species (brook trout and brown trout). In addition, during the winter months, the applicant's proposed flow of 20 cfs provides only 50% wetted conditions in the bypass reaches. Increasing the bypass flow from 20 to 40 cfs increases wetted conditions to between 64% (Dundee) and 68% (Mallison Falls), which provides significantly more habitat for aquatic organisms. Finally, 40 cfs is the breakpoint in the increase in wetted conditions provided by increased bypass flows (flows above 40 cfs provide smaller increases in wetted conditions than do flows up to 40 cfs), In view of these site-specific conditions, minimum flows of 60 cfs from May 1 through October 31 and 40 cfs from November 1 through April 30 in the Dundee and Mallison Falls bypasses reaches will improve overall habitat conditions for macroinvertebrates and other aquatic species, including brook trout and brown trout and are necessary to ensure that these waters will meet applicable water quality standards, subject to the other provisions of this Order. Specifically, there is a reasonable assurance that minimum flows of 60 cfs from May 1 through October 31 and 40 cfs from November 1 through April 30 in the Dundee and Mallison Falls bypass reaches are necessary to ensure that the identified waters will be suitable for the designated use of habitat for aquatic life and that the identified waters will be of sufficient quality to support all aquatic species indigenous to these waters without detrimental changes in the resident biological community. A follow-up study should be conducted to document attainment of aquatic life standards.

7. DISSOLVED OXYGEN

a. *Existing Conditions.* Except during periods of heavy precipitation or high runoff, the majority of the flow in the Presumpscot River comes from Sebago Lake, which is the public water supply for the metropolitan Portland-South Portland area. The water of Sebago Lake is generally of high quality and has dissolved oxygen levels in excess of all riverine standards both at the surface and at depth. The Presumpscot River is currently classified as Class A from the outlet of Sebago Lake to its confluence with the Pleasant River (about half-way through the Gambo impoundment), and as Class B from this point to the Saccarappa dam. Below the Saccarappa Dam, discharges from the City of Westbrook waste water treatment plant and from the applicant's Westbrook paper mill reduce water quality, and the assigned river classification falls to Class C.

b. *Monitoring Data.* The applicant has conducted water quality monitoring in project impoundment and tailwater areas (except for Dundee Pond, which is Class GPA and thus does not have a dissolved oxygen standard) in accordance with the DEP's river. Sampling Protocol. Sampling was conducted during the summer of 1997 at eleven locations on the Presumpscot River between the Dundee tailrace and the Saccarappa Dam Sampling was conducted at one location each on the Pleasant River and the Little River, which are the two main tributaries to the Presumpscot River.

Analysis of the data indicates that dissolved oxygen standards are met in the Class A segment of the river. However, the data show early morning

non-attainment of Class B dissolved oxygen standards in the Pleasant River and the lower Gambo impoundment The data also show early morning marginal attainment of Class B dissolved oxygen standards in the Little Falls impoundment and the Saccarappa tailwater.

The 1997 data confirm monitoring data collected by DEP in 1993, which showed early morning non-attainment of Class B dissolved oxygen standards in the lower Gambo, Little Falls, and Saccarappa impoundments. Additional confirmation of dissolved oxygen non-attainment in these impoundments, as well as in the lower Gambo impoundment, comes from data collected during the summers of 1998, 1999, 2000, 2001, and 2002 by the Presumpscot River Watch.

c. *Modeling.* The DEP Division Of Environmental Assessment (DEA) has developed a water quality model to predict dissolved oxygen levels in the Presumpscot River. In its "Presumpscot River Waste Load Allocation Final Report" (November 1995), DEA found that, under critical water quality conditions (summer low flow/high water temperature conditions), the model predicted that non-attainment of Class B dissolved oxygen would occur in a 2.4-mile-long reach of the river in the Little Falls and Mallison Falls impoundments. The model was based on hydraulic data and water quality data collected by the DEP during 1993 and 1994.

In a follow-up titled "Supplemental Report to Waste Load Allocation" (March 1998), DEA reported on the results of additional verification runs made on the model using data reported by the U.S. Geological Survey during 1994 and 1995 from a four parameter monitor located at the

Smelt Hill Dam below Westbrook. The model now predicted non-attainment of Class B dissolved oxygen standards under critical water quality conditions in an 8-mile-long reach of the river in the Little Falls, Mallison Falls, and Saccarappa impoundments.

d. *Applicant's Proposals.* The applicant proposes to continue run-of-river operation and daily headpond monitoring and to avoid drawdowns of the project impoundments for maintenance during May and June.

The applicant also proposes to provide minimum flow releases into the bypass reach at each project dam, as described in Section 5(e) above.

e. *Agency Comments.* In comments dated February 8, 2002 and October 18, 2002, DEA reports that the proposed bypass flows would improve dissolved oxygen conditions in the river (by increasing reaeration), but that model runs indicate continued non-attainment of Class B dissolved oxygen standards. As a result, DEA recommends that, in addition to spillage of bypass flows as discussed in Section 6 above, spillage flows of 50 cfs at Dundee and 100 cfs at Gambo be released whenever river temperatures as measured at the Gambo Dam before 8 AM exceed 22 degrees Celsius. The DEA's model predicts that this spillage will be sufficient to eliminate dissolved oxygen non-attainment under dry weather conditions. The model further predicts that, even with the recommended spillage flows, there will still be dissolved oxygen non-attainment in the river under wet weather conditions, due to the presence of significant non-point source pollution coming primarily from tributary streams (e.g., the Pleasant River and the Little River). As a

result, DEA further recommends that non-point source pollution abatement measures also be taken in order to ensure compliance with Class B dissolved oxygen standards under wet weather conditions.

f. *NGO Comments.* In comments dated August 1, 2001 and September 30, 2002, non-governmental organizations (NGOs) American-Rivers and Friends of the Presumpscot River contend that the five Presumpscot River Projects are causing or contributing to the failure of the river to meet applicable dissolved oxygen criteria and that additional measures must be taken to meet water quality standards.

g. *Discussion.* Dams can lower dissolved oxygen concentrations by reducing natural reaeration, increasing time of travel, increasing water temperature, and creating settling basins for sediments and nutrients.

The evidence in the record indicates that the non-attainment of dissolved oxygen standards (both modeled and monitored) in the Presumpscot River is the result of (1) the existence of multiple impoundments in close proximity to one another, (2) the lack of natural reaeration below the dams, (3) the over-night respiration of bottom attached algae, and (4) the impact of non-point sources of pollution (e.g. agricultural runoff and sedimentation from land use activities). Were it not for the presence and current operation of the project dams, the Presumpscot River would meet Class B dissolved oxygen standards, particularly under dry weather conditions when the effect of non-point source pollution on dissolved oxygen levels is minimal. It therefore follows that the dams cause or contribute to the violation of

dissolved oxygen standards in the river, and that appropriate changes in project structures and/or operation must be made to eliminate the dams' contribution to the violation of standards.

It is noted that there are several measures that could be effective in increasing dissolved oxygen concentrations in the river. These include, but may not be limited to, spillage, turbine venting, air/oxygen injection, and partial impoundment drawdowns. Some of these measures may be more cost-effective for the applicant than others.

It is further noted that the applicant is not responsible for the presence of non-point source pollution in the river and thus should not be responsible for the abatement of this pollution. Similarly, the applicant should not be responsible for mitigating the effects of such pollution on dissolved oxygen concentrations under wet weather conditions.

In view of the evidence in the record, the spillage of 50 cfs at the Dundee Project and 100 cfs the Gambo Project, in addition to the spillage of bypass flows as discussed in Section 6 above, whenever river temperatures as measured at the Gambo Dam before 8 AM exceed 22 degrees Celsius, or other equivalent measures, will improve dissolved oxygen concentrations in the river and are necessary to meet Class B dissolved oxygen standards in the river under dry weather conditions. A follow-up study should be conducted to evaluate the effectiveness of spillage or any other measures implemented to improve dissolved oxygen concentrations.

8. RECREATIONAL ACCESS AND USE

a. *Existing Conditions.* Existing recreational activities in and adjacent to the Presumpscot River include fishing, canoeing and other open water boating, swimming, hiking, picnicking, hunting, and snowmobiling.

There are numerous existing formal and informal recreation facilities within the areas of the Presumpscot River Hydro Projects.

b. *Applicant's Proposals.* The applicant proposes to develop a Recreational Facility Enhancement Plan for each of the five projects. Each Plan will consist of various measures intended to maintain and/or enhance recreational access and use in the project areas, as summarized in Section 1(e) above.

c. *Discussion.* There is a reasonable assurance that the applicant's proposals will be adequate to ensure that the project waters are suitable for the designated use of recreation in and on the water, subject to other provisions of this Order.

9. WETLANDS AND WILDLIFE RESOURCES

a. *Existing Conditions.* The areas in and adjacent to the Presumpscot River Hydro Projects support various wildlife species common to southern Maine river corridor habitats that range from urban to suburban to rural in character. Typical wildlife resources include songbird and predatory bird species, small mammals, large game animals, and amphibians. A 1997 survey did not reveal the presence of any rare, threatened or endangered species in the project areas, though bald eagles may over winter in the area.

There are four wetland community types within the combined project areas, totaling almost 108 acres. These include palustrine forested, palustrine scrub-shrub, palustrine emergent, and palliating unconsolidated bottom. The majority of the existing wetlands rely on river flows and/or flooding for hydrologic inputs.

More than half of the wetlands are palustrine forested wetlands, while 74% of the total wetland acres occur in the area above the Saccarappa Dam.

b. *Applicant's Proposals.* The applicant proposes to continue run-of-river operation and daily headpond monitoring and to avoid drawdowns of the project impoundments for maintenance during May and June.

d. *Discussion.* There is a reasonable assurance that the applicant's proposals will be adequate to ensure that the project waters contained in wetlands are suitable for the designated uses of habitat for aquatic life, subject to the other provisions of this Order.

10. HYDROELECTRIC POWER GENERATION

a. *Existing Generation.* The five Presumpscot River Projects currently have a combined installed capacity of 7,450 kW and generate an average of about 40,500,000 kilowatt-hours of electricity annually. Individual project generation and fuel equivalency data is given in the following table:

Existing Generation – Presumpscot River Projects

Project	Installed Capacity (kW)	Annual Generations (kWh)	Fuel Equivalencies	
			Oil @600 kWh/barrel	Coal @2158 kWh/ton
Dundee	2,400	16×10^6	26,667 barrels	7,414 tons
Gambo	1,900	8.5×10^6	14,167 barrels	3,939 tons
Little Falls	1,000	4.2×10^6	7,000 barrels	1,946 tons
Mallison Falls	800	4.2×10^6	7,000 barrels	1,946 tons
Saccarappa	1,350	7.6×10^6	12,667 barrels	3,522 tons
TOTALS	7,450	40.5×10^6	67,501 barrels	18,767 tons

b. *Existing Energy Policies/Plans.* The State of Maine has developed a comprehensive energy plan (Final Report of the Commission on Comprehensive Energy Planning, May 1992) with the goal of meeting the State's energy needs with reliable energy supplies at the lowest possible cost, while assuring that energy production and use are consistent with a healthy environment and vibrant economy. Specifically, the Plan establishes the following targets for Maine's energy future:

- Reduce the State's level of dependence on oil from 50% to at least the national average of 43% by the year 2000, with further reductions to at least the 30% level by 2010;
- Increase the percentage of renewable energy resources in the State's primary energy mix from 30% to 40% by the year 2000, and to at least 50% by 2010;

- Increase statewide energy efficiency relative to 1990 levels by 25% by the year 2000 and by at least 50% by 2010; and
- Work to stabilize long-term energy prices, in balance with Maine's other energy-related goals, with a special emphasis on enhancing Maine's competitive position relative to New England and the United States.

With respect to renewable energy, the Plan recommends that Maine actively encourage the development of wind and solar energy resources and support the continued utilization and further development, where appropriate, of the State's renewable, indigenous hydro and biomass energy resources.

c. *Applicant's Proposals.* The applicant is proposing to continue to operate the five projects as run-of-river projects providing base-load power to the applicant's Westbrook paper mill. Together, the projects provide about 22.5% of the annual energy demand of the Westbrook mill.

d. *Discussion.* The evidence in the record (FERC FEIS, June 2002) indicates that the minimum bypass flows, spillage flows, and fish passage facilities discussed above will reduce average annual generation from 40.5 million to 34.5 million kWh. Individual project generation and fuel equivalency data for future generation based on the terms and conditions of this certification is given in the following table:

Future Generation – Presumpscot River Projects

Project	Installed Capacity (kW)	Annual Generations (kWh)	Fuel Equivalencies	
			Oil @600 kWh/barrel	Coal @2158 kWb/ton
Dundee	2,400	13.5×10^6	22,500 barrels	6,256 tons
Gambo	1,900	7.3×10^6	12,167 barrels	3,383 tons
Little Falls	1,000	3.5×10^6	5,833 barrels	1,622 tons
Mallison Falls	800	3.6×10^6	6,000 barrels	1,668 tons
Saccarappa	1,350	6.6×10^6	11,000 barrels	3,058 tons
TOTALS	7,450	34.5×10^6	57,500 barrels	15,987 tons

In view of the evidence in the record, there is a reasonable assurance that the proposed operation of the projects, as conditioned by this approval, will be adequate to ensure that the project waters are suitable for the designated use of hydroelectric power generation.

BASED on the above FINDINGS OF FACT and the evidence contained in the applications, and subject to the conditions listed below, the Department CONCLUDES that the continued operation of the Presumpscot River Hydro Projects, as described above, will result in all waters affected by the project being suitable for all designated uses and meeting all other applicable water quality standards, provided that:

1. Run-of-river operations are continued at the project dams, and adequate minimum flows are provided into the bypass reach at each project, as discussed above;

2. Impoundment drawdowns for maintenance are avoided during May and June and impoundment refill procedures are implemented, as proposed;

3. Upstream eel passage facilities are installed at all project dams;

4. Operational measures are instituted at all project dams to provide downstream eel passage, as discussed above;

5. Upstream and downstream anadromous fish passage facilities are installed at all project dams, as discussed above;

6. Additional spillage is instituted or other equivalent measures are taken at the Dundee and Gambo Projects to meet Class B dissolved oxygen standards in the river under dry weather conditions, as discussed above; and

7. A Recreational Facility Enhancement Plan is developed and implemented for each project, as proposed.

THEREFORE, the Department APPROVES the applications of S.D. WARREN COMPANY and GRANTS CERTIFICATION that there is a reasonable assurance that the continued operation of the PRESUMPSCOT RIVER HYDRO PROJECTS, as described above, will not violate applicable water quality standards. SUBJECT TO THE FOLLOWING CONDITIONS:

1. WATER LEVELS AND FLOWS

   A. Except as temporarily modified by (1) approved maintenance activities, (2) extreme hydrologic conditions, as defined below, or (3) emergency electrical system conditions, as defined below or (4) agreement between the applicant and other appropriate state and/or federal agencies,

all projects shall be operated in a run-of-river mode, with outflow approximately equal to inflow on an instantaneous basis except during flashboard failure or replacement, and with impoundment levels maintained within 1 foot of full pond when flashboards are in place and within 1 foot of spillway crest elevation when flashboards are not in place.

B. Except as temporarily modified by (1) approved maintenance activities, (2) extreme hydrologic conditions, as defined below, or (3) emergency electrical system conditions, as defined below or (4) agreement between the applicant and other appropriate state and/or federal agencies, the following minimum flow releases shall be provided annually into the project bypass reaches:

- Dundee: 60 cfs from May 1 through October 31 and 40 cfs from November 1 through April 30.
- Gambo: 60 cfs year-round.
- Little Falls: Existing leakage (approximately 26 cfs).
- Mallison Falls: 60 cfs from May 1 through October 31 and 40 cfs from November 1 through April 30.
- Saccarappa: Existing leakage (approximately 13 cfs).

Minimum bypass flows shall consist of uncontrolled leakage, spillage, and any flows released into the bypass reaches through any upstream and downstream eel passage and anadromous fish passage facilities provided at the projects. To the extent possible, all minimum flows shall be

provided as spillage at the project dams, in order to provide maximum reaeration.

C. "Extreme Hydrologic Conditions" means the occurrence of events beyond the Licensee's control such as but not limited to abnormal precipitation, extreme runoff, flood conditions, ice conditions or other hydrologic conditions such that the operational restrictions and requirements contained herein are impossible to achieve or are inconsistent with the safe operation of the Project.

D. "Emergency Electrical System Conditions" means operating emergencies beyond Licensee's control which require changes in flow regimes to eliminate such emergencies which may in some circumstances include but are not limited to equipment failure or other abnormal temporary operating condition, generating unit operation or third-party mandated interruptions under power supply emergencies; and orders from local, state or federal law enforcement or public safety authorities.

E. The applicant shall, within 6 months of issuance of a New License for the project by FERC or upon such other schedule as established by FERC, submit plans for providing and monitoring run-of-river operations, impoundment levels, and minimum bypass flows as required by Parts A and B of this condition. These plans shall be reviewed by and must receive the approval of the DEP Bureau of Land and Water Quality.

F. Upon completion of a habitat assessment by the Atlantic Salmon Commission and notification to the applicant of initiation of active Atlantic salmon restoration activities in the Presumpscot

River, the applicant shall conduct a study to evaluate the effectiveness of the minimum bypass flows required by Part B of this condition in providing habitat for various life stages of Atlantic salmon.

G. The applicant shall, within 6 months after notification from the Atlantic Salmon Commission on initiation of active Atlantic salmon restoration activities ir the Presumpscot River, or upon such ether schedule as established by PERC, submit plans for a study to evaluate the effectiveness of minimum bypass flows required by Part B of this condition in providing habitat for Atlantic salmon, prepared in consultation with ASC. This study shall include evaluation of the effectiveness of bypass flows in providing habitat for Atlantic salmon spawning and egg incubation and production of juvenile Atlantic salmon. This plan shall be reviewed by and must receive approval of the DEP prior to implementation. In reviewing the plan, the DEP will consider the recommendations of the ASC.

H. The applicant shall, in accordance with a schedule set forth in the study plan or upon such other schedule as established by FERC, submit the results of any bypass flow effectiveness study, along with any recommendations for changes in the minimum bypass flows required by this condition. After reviewing the study results, and after notice to the applicant and opportunity for hearing, the Department reserves the right to require such changes in the minimum bypass flows established in this certification as may be deemed necessary to provide Atlantic salmon habitat in the bypass reaches.

2. IMPOUNDMENT DRAWDOWN AND REFILL PROCEDURES

   A. The applicant shall, unless necessary to address emergency situations or to address dam safety and/or public safety concerns, avoid maintenance drawdowns of the project impoundments during the months of May and June.

   B. The applicant shall implement the following procedures for refilling the project impoundments after any impoundment drawdowns:

      - If allowed under the FERC-approved Sebago lake level management plan, outflows shall be temporarily increased from Sebago Lake to refill the impoundments while flows from each project are maintained as required by the flow/temperature curve component of the lake level management plan.

      - If increased outflows from Sebago Lake are not allowed under the FERC-approved Sebago lake level management plan, a maximum of 25% of the outflow from Sebago Lake shall be used to refill the impoundments while flows from each project are maintained at 75% or more of the outflow from Sebago Lake.

3. UPSTREAM EEL PASSAGE

   A. Upstream eel passage facilities shall be installed and operational at all projects within 2 years following the issuance of a new FERC license for the projects.

   B. The applicant shall, at least 60 days prior to construction or upon such other schedule as established by FERC, submit final design and operational plans for the upstream eel passage

facilities required by Part A of this condition, prepared in consultation with the Department of Marine Resources. These plans shall be reviewed by and must receive the approval of DEP prior to construction. In reviewing the plans, the DEP will consider the recommendations of DMR.

C. The applicant shall, in consultation with the Department of Marine Resources, conduct a study or studies to determine the effectiveness of the upstream eel passage facilities required by this condition.

D. The applicant shall, concurrent with the commencement of facilities operation or upon such other schedule as established by FERC, submit plans for a study or studies to determine the effectiveness of the upstream eel passage facilities required by Part A of this condition, prepared in consultation with the Department of Marine Resources. These plans shall be reviewed by and must receive the approval of DEP prior to implementation. In reviewing the plans, the DEP will consider the recommendations of DMR.

E. The applicant shall, in accordance with a schedule set forth in the study plan or upon such other schedule as established by FERC, submit the results of any upstream eel passage effectiveness studies, along with any recommendations for changes in the design and/or operation of any passage facilities installed pursuant to this condition.

F. The applicant shall be responsible for taking such actions as are needed to effectively pass eels upstream through the projects. After reviewing the study results, and after notice to the applicant and opportunity for hearing, the

Department reserves the right to require reasonable changes in the design and/or operation of the upstream eel passage facilities installed pursuant to this condition as may be deemed necessary to effectively pass eels upstream through the projects.

4. DOWNSTREAM EEL PASSAGE

A. The applicant shall, immediately following the issuance of a new FERC license for the projects, institute operational measures to provide downstream eel passage at all projects. These measures must include suspending generation at each project for at least 4 hours per night for at least four one-week periods during the downstream eel migration period. The timing of the generation shutdown shall be determined each year, in consultation with the Department of Marine Resources, to maximize the expected benefit for downstream eel migration.

B. The applicant shall, in consultation with the Department of Marine Resources, conduct a 3-year study to determine the exact timing of the generation shutdown, so as to result in the optimum benefit for downstream eel migration.

C. The applicant shall, within 60 days following the issuance of a new FERC license for the project or upon such other schedule as established by FERC, submit plans for a study to determine the exact timing of the generation shutdown required by Part B of this condition, prepared in consultation with the Department of Marine Resources. These plans shall be reviewed by and must receive the approval of DEP prior to implementation. In reviewing the plans, the DEP will consider the recommendations of DMR.

D. The applicant shall, in accordance with a schedule set forth in the study plan or upon such other schedule as established by FERC, submit the results of the downstream eel passage study, along with any recommendations for the exact timing of the generation shutdowns required by this condition.

E. The applicant shall be responsible for taking such actions as are needed to effectively pass eels downstream through the projects. After reviewing the study results, and after notice to the applicant and opportunity for hearing, the Department reserves the right to require changes in the timing of the operational shutdowns required by this condition as may be deemed necessary to effectively pass eels downstream through the projects.

F. In the event that downstream passage facilities are installed at a project pursuant to Condition 5 below, the applicant may, in consultation with the Department of Marine Resources, conduct a study to determine the effectiveness of these facilities in passing eels downstream through the project. Upon request by the applicant, and after reviewing the study results and the recommendations of DMR, the Department reserves the right to reduce or terminate the operational shutdowns required by this condition.

5. UPSTREAM AND DOWNSTREAM ANADROMOUS FISH PASSAGE

SACCARAPPA PROJECT

A. The applicant shall install and operate the following upstream fish passage facilities at the project:

- *Phase I.* A Denil "fish ladder," or other passage facilities of comparable efficiency in passing the target species, designed to pass at least 18,000 American shad, 109,000 blueback herring, and 273 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 2 years after passage is available at the downstream Cumberland Mills Dam.

- *Phase II.* Convert or replace the Phase I passage facilities with a fish lift, or other passage facilities of comparable efficiency in passing the target species, designed to pass up to 58,000 American shad, 353,000 blueback herring, and 426 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 2 years after (1) notification from the Department of Marine Resources, the Department of Inland Fisheries and Wildlife, and the Atlantic Salmon Commission of initiation of Phase II restoration above Gambo Dam and (2) the capacity of the installed Phase I passage facilities has been reached for any of the target species.

B. The applicant shall install and operate downstream passage facilities designed to pass American shad, blueback herring, and Atlantic salmon at the project. These facilities shall be operational concurrent with the completion of upstream anadromous fish passage facilities at the project or within 2 years following notification by the Department of Marine Resources or the Atlantic Salmon Commission of sustained stocking of anadromous fish above the Saccarappa Dam, whichever comes first.

MALLISON FALLS PROJECT

A. The applicant shall install and operate the following upstream fish passage facilities at the project:

- *Phase I.* A Denil "fish ladder," or other passage facilities of comparable efficiency in passing the target species, designed to pass at least 4,200 American shad, 26,000 blueback herring, and 32 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 2 years after passage of at least 2,960 American shad or 18,020 blueback herring in any single year at the downstream Saccarappa Project.

- *Phase II.* Convert or replace the Phase I passage facilities with a fish lift, or other passage facilities of comparable efficiency in passing the target species, designed to pass up to 44,000 American shad, 270,000 blueback hearing, and 185 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 2 years after (1) notification from the Department of Marine Resources, the Department of Inland Fisheries and Wildlife, and the Atlantic Salmon Commission of initiation of Phase II restoration above Gambo Dam and (2) the capacity of the installed Phase I passage facilities has been reached for any of the target species.

B. The applicant shall install and operate downstream passage facilities designed to pass American shad, blueback herring, and Atlantic salmon at the project. These facilities shall be

operational concurrent with the completion of upstream anadromous fish passage facilities at the project or within 2 years following notification by the Department of Marine Resources or the Atlantic Salmon Commission of sustained stocking of anadromous fish above the Mallison Falls Dam, whichever comes first.

LITTLE FALLS PROJECT

A. The applicant shall install and operate the following upstream fish passage facilities at the project:

- *Phase I.* A Denil "fish ladder," or other passage facilities of comparable efficiency in passing the target species, designed to pass at least 3,100 American shad, 19,000 blueback herring, and 15 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 2 years after passage of at least 2,960 American shad or 18,020 blueback herring in any single year at the downstream Saccarappa Project.

- *Phase II.* Convert or replace the Phase I passage facilities with a fish lift, or other passage facilities of comparable efficiency in passing the target species, designed to pass up to 43,000 American shad, 263,000 blueback herring, and 168 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 2 years after (1) notification from the Department of Marine Resources, the Department of Inland Fisheries and Wildlife, and the Atlantic Salmon Commission of initiation of

Phase II restoration above Gambo Dam and (2) the capacity of the installed Phase I passage facilities has been reached for any of the target species.

B. The applicant shall install and operate downstream passage facilities designed to pass American shad, blueback herring, and Atlantic salmon at the project. These facilities shall be operational concurrent with the completion of upstream anadromous fish passage facilities at the project or within 2 years following notification by the Department of Marine Resources or the Atlantic Salmon Commission of sustained stocking of anadromous fish above the Little Falls Dam, whichever comes first.

GAMBO PROJECT

A. The applicant shall install and operate the following upstream fish passage facilities at the project:

- *Phase I.* No upstream fish passage facilities required.
- *Phase II.* A fish lift, or other passage facilities of comparable efficiency in passing the target, designed to pass up to 40,000 American shad, 244,000 blueback herring, and 153 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 2 years after (1) notification from the Department of Marine Resources, the Department of Inland Fisheries and Wildlife, and the Atlantic Salmon Commission of initiation of Phase II restoration above Gambo Dam and (2) passage of at least 620 American shad or 3,800 blueback herring in any

single year at the downstream Little Falls Project.

B. The applicant shall install and operate downstream passage facilities designed to pass American shad, blueback herring, and Atlantic salmon at the project. These facilities shall be operational concurrent with the completion of upstream anadromous fish passage facilities at the project or within 2 years following notification by the Department of Marine Resources or the Atlantic Salmon Commission of sustained stocking of anadromous fish above the Gambo Dam, whichever comes first.

DUNDEE PROJECT

A. The applicant shall install and operate the following upstream fish passage facilities at the project:

- *Phase I.* No upstream fish passage facilities required.
- *Phase II.* A fish lift, or other passage facilities of comparable efficiency in passing the target species, designed to pass up to 20,000 American shad, 122,000 blueback herring, and 64 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 2 years after (1) notification from the Department of Marine Resources, the Department of Inland Fisheries and Wildlife, and the Atlantic Salmon Commission of initiation of Phase II restoration above Gambo Dam and (2) passage of at least 4,020 American shad or 24,460 blueback herring in any single year at the downstream Gambo Project.

B. The applicant shall install and operate downstream passage facilities designed to pass American shad, blueback herring, and Atlantic salmon at the project. These facilities shall be operational concurrent with the completion of upstream anadromous fish passage facilities at the project or within 2 years following notification by the Department of Marine Resources or the Atlantic Salmon Commission of sustained stocking of anadromous fish above the Dundee Dam, whichever comes first.

ALL PROJECTS

C. The applicant shall, at least 180 days prior to construction or upon such other schedule as established by FERC, submit final design and operational plans for the upstream and downstream anadromous fish passage facilities required by Parts A and B of this condition, prepared in consultation with the Department of Marine Resources and the Atlantic Salmon Commission. These plans shall be reviewed by and must receive the approval of DEP prior to construction. In reviewing the plans, the DEP will consider the recommendations of the ASC and DMR.

D. The applicant shall, in consultation with the Department of Marine Resources and the Atlantic Salmon Commission, conduct a study or studies to determine the effectiveness of the upstream and downstream anadromous fish passage facilities required by this condition.

E. The applicant shall, concurrent with the commencement of facilities operation or upon such other schedule as established by FERC, submit plans for a study or studies to determine the effectiveness of the upstream and downstream

anadromous fish passage facilities required by Parts A and B of this condition, prepared in consultation with the Department of Marine Resources and the Atlantic Salmon Commission. These plans shall be reviewed by and must receive the approval of DEP prior to implementation. In reviewing the plans, the DEP will consider the recommendations of the ASC and DMR.

F. The applicant shall, in accordance with a schedule set forth in the study plan or upon such other schedule as established by FERC, submit the results of any upstream and downstream anadromous fish passage effectiveness studies, along with any recommendations for changes in the design and/or operation of any passage facilities installed pursuant to this condition.

G. The applicant shall be responsible for taking such actions as are needed to effectively pass anadromous fish upstream and downstream through the projects, insofar as passage is required in accordance with Parts A and B of this condition. After reviewing the results of the study, and after notice to the applicant and opportunity for hearing, the Department reserves the right to require reasonable changes in the design and/or operation of the upstream and downstream anadromous fish passage facilities installed pursuant to this condition as may be deemed necessary to effectively pass anadromous fish upstream and downstream through the projects.

6. REAERATION MEASURES

A. The applicant shall, commencing with the issuance of a new FERC license for the project, institute the spillage of 50 cfs at the Dundee Dam

and 100 cfs at the Gambo Dam, or take other equivalent measures as may be approved by the Department in order to meet Class B dissolved oxygen standards in the river from Dundee Dam to Saccarappa Dam under dry weather conditions. Spillage must occur whenever river temperatures exceed 22 degrees Celsius, as measured at the Gambo Dam before 8 AM, and shall be in addition to the minimum bypass flows required by Condition 1 above.

B. The applicant shall, within 6 months of issuance of a New License for the project by FERC or upon such other schedule as established by FERC, submit plans for providing and monitoring spillage or other approved reaeration measures as required by Part A of this condition. These plans shall be reviewed by and must receive the approval of the DEP Bureau of Land and Water Quality.

C. The applicant shall, in consultation with the Department, conduct a study or studies to determine the effectiveness of the spillage or other measures required by this condition in meeting Class B dissolved oxygen standards.

D. The applicant shall, within 60 days following the issuance of a new FERC license for the project or upon such other schedule as established by FERC, submit plans for a study or studies to determine the effectiveness of the spillage or other measures taken pursuant to Part A of this condition in meeting Class B dissolved oxygen standards. These plans shall be reviewed by and must receive the approval of DEP prior to implementation.

E. The applicant shall, in accordance with a schedule set forth in the study plan or upon such other schedule as established by FERC, submit the results of any studies to determine the effectiveness of the spillage or other measures taken pursuant to Part A of this condition to meet Class B dissolved oxygen standards in the river from Dundee Dam to Saccarappa Dam, along with any recommendations for changes in measures taken pursuant to this condition.

F. The applicant shall be responsible for taking such actions as are needed to meet dissolved oxygen standards in the river from Dundee Dam to Saccarappa Dam, insofar as the project dams cause, or contribute to a violation of these standards under dry weather conditions. After reviewing the study results, and after notice to the applicant and opportunity for hearing, the Department will reopen and modify the terms of this certification to require reasonable changes in the design and/or operation of the projects as may be deemed necessary to meet Class B dissolved oxygen standards in the river from Dundee Dam to Saccarappa Dam under dry weather conditions.

7. RECREATIONAL FACILITIES

A. The applicant shall develop and implement a Recreational Facility Enhancement Plan for each project, which shall include, at a minimum, the following measures to maintain and/or enhance recreational access and. use in the project areas:

DUNDEE PROJECT

- Rerouting, stabilizing, and maintaining the existing canoe portage trail;

- Seeking an easement to provide walk-in angler access to the project bypass reach; and
- Investigating whether an existing access easement can be altered to permit fishery agency access for stocking purposes.

GAMBO PROJECT

- Enhancing and maintaining the existing informal canoe portage trail;
- Developing an interpretive sign to explain the history of the Oriental Powder Mill Complex;
- Providing walk-in angler access to the bypass reach;
- Developing parking and signs for carry-in boat access at the portage take-out location; and
- Assisting the Town of Gorham in regrading and enhancing the Gambo Road approach to the former bridge area immediately upstream from the dam.

LITTLE FALLS

- Establishing and maintaining a canoe portage trail;
- Assist Gorham Trails in developing parking. signage, and access for a carry-in boat launch at the Gorham Land Trust Property off of the Tow Path Road; and
- Donate approximately 0.8 acres of land on the island located off-shore of the Hawkes Property to the Gorham Land Trust.

MALLISON FALLS

- Es'ablishing and maintaining a formal canoe portage trail;
- Providing signs for parking and access at the existing carry-in boat access site at the project powerhouse;
- Developing parking, signage, and access for a carry-in boat a.:ess site above the project dam;
- Seeking permission from the Department of Transportation and the Town of Gorham to provide a roadside pullout and carry-in boat access site next to the bridge abutment above the project dam; and
- Continuing to seek an easement or other opportunities to provide walk-in angler access to the bypass reach.

B. The applicant shall, within 12 months following the issuance of a new FERC license for the project or upon such other schedule as established by FERC, submit a Recreational Facility Enhancement Plan for each project as required by Part A of this condition. This plan shall be prepared in consultation with the Department of Conservation and the Department of Inland Fisheries and Wildlife, and shall include a schedule for implementation. This plan shall be reviewed by and must receive approval of the DEP.

8. LIMITS OF APPROVAL

This approval is limited to and includes the proposals and plans contained in the applications and supporting documents submitted and affirmed to by the applicant.

9. COMPLIANCE WITH ALL APPLICABLE LAWS

The applicant shall secure and appropriately comply with all applicable federal, state and local licenses, permits, authorizations, conditions, agreements and orders required for the operation of the projects in accordance with the terms of this certification.

10. EFFECTIVE DATE

This water quality certification shall be effective concurrent with the effective date of the licenses issued for the projects by the Federal Energy Regulatory Commission.

DONE AND DATED AT AUGUSTA. MAINE, THIS 30TH DAY OF April, 2003.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: /s/ Dawn R. Gallagher
Dawn R. Gallagher, Commissioner

PLEASE SEE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES.

Date of receipt of application: 12/20/2002

Date application accepted for processing: 12/30/2002

(Initial application received 01/14/1999 and subsequently withdrawn and refiled 01/12/2000, 01/11/2001, and 12/20/2002)

Date filed with Board of Environmental Protection MAY 1, 2003.

This Order prepared by Dana Murch, Bureau of Land & Water Quality.

STATUTORY PROVISIONS INVOLVED

The issues presented involve interpretation of the Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. §§ 1251 *et seq.*, and the Federal Power Act, 16 U.S.C. § 79la *et seq.* The pertinent text from both acts, beginning with the Clean Water Act, follows.

Clean Water Act

33 U.S.C. § 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. . . . If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as

provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

. . . .

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in

(A) the construction or operation of the facility,

(B) the characteristics of the waters into which such discharge is made,

(C) the water quality criteria applicable to such waters or

(D) applicable effluent limitations or other requirements.

. . . .

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, and 1317 of this title.

. . . .

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

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§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of

pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either

(A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or

(B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

---

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

. . . .

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means

(A) any addition of any pollutant to navigable waters from any point source,

(B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

. . . .

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

Federal Power Act

16 U.S.C. § 797. General powers of Commission

The Commission is authorized and empowered –

. . . .

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc. To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided. . . . In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

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§ 799. License; duration, conditions, revocation, alteration, or surrender

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.

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§ 803. Conditions of license generally

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other

beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by –

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from

cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capability for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license.

. . . .

. . . .

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

---

§ 821. State laws and water rights unaffected

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

---

(3)

Supreme Court, U.S.
FILED
JUN 15 2005
OFFICE OF THE CLERK

No. 04-1527

In The Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For Writ Of Certiorari To The Maine Supreme Judicial Court

RESPONDENT MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

G. STEVEN ROWE
Attorney General

PAUL STERN
Deputy Attorney General

GERALD D. REID
Assistant Attorney General

CAROL A. BLASI
Assistant Attorney General
(*Counsel of Record*)

Six State House Station
Augusta, Maine 04333-0006
(207) 626-8582

Counsel for Respondent Maine Department of Environmental Protection

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether a state has conditioning authority pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341, for the relicensing of a hydroelectric dam, the operation of which involves the discharge of water back into the river after it has passed through the turbines and other dam structures, and results in continuing negative impacts to the water quality of the river?

2. Whether "reopener" conditions in a water quality certification are authorized by Section 401, and are consistent with the Federal Energy Regulatory Commission's ("FERC") licensing authority under the Federal Power Act, 16 U.S.C. §§ 791a *et seq*.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
MAINE'S BRIEF IN OPPOSITION	1
STATEMENT OF THE CASE	1
I. Factual Background	1
II. Procedural Background	4
III. Decision of the Maine Law Court	5
REASONS FOR DENIAL OF THE WRIT	6
I. THE COURT SHOULD DENY THE WRIT ON THE FIRST QUESTION BECAUSE THE ISSUE NOW RAISED BY PETITIONER WAS NOT FULLY ARGUED BEFORE OR EVALUATED BY THE LAW COURT	8
II. THE MAINE LAW COURT'S DECISION APPLYING SECTION 401 DOES NOT CONFLICT WITH *MICCOSUKEE* AND ITS INTERPRETATION OF SECTION 402, BECAUSE THESE SECTIONS USE DIFFERENT LANGUAGE AND HAVE DIFFERENT PURPOSES	10
III. THE LAW COURT'S DECISION REGARDING WHAT CONSTITUES A DISCHARGE UNDER SECTION 401 DOES NOT CONFLICT WITH THE DECISIONS OF UNITED STATES COURTS OF APPEALS, AND IS CONSISTENT WITH THE LONGSTANDING INTERPRETION BY THE EPA AND FERC	14

TABLE OF CONTENTS – Continued

	Page
A. The Law Court's Decision is Consistent with Decisions of United States Courts of Appeals	14
B. The Law Court Decision is Consistent with the Interpretations of EPA and FERC	16
IV. THE MAINE LAW COURT'S DECISION DOES NOT CONFLICT WITH FERC'S LICENSING AUTHORITY UNDER THE FPA	19
A. The Certification Was Within the Scope of the State's Authority Under Section 401	19
B. The Maine Law Court's Decision Does Not Conflict with the FPA Which Contains No Implied or Express Limitation on the States' Authority Under Section 401	21
CONCLUSION	25

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adams v. Robertson, 520 U.S. 83 (1997) 8

Alabama Rivers Alliance v. FERC, 325 F.3d 290 (D.C. Cir. 2003) 15, 17

American Rivers, Inc. v. FERC, 129 F.3d 99 (2nd Cir. 1997) 8, 19, 23, 24

Auer v. Robbins, 519 U.S. 452 (1997) 17

California v. FPC, 345 F.2d 917 (9th Cir. 1965), *cert. denied*, 382 U.S. 941 (1965) 22

Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York, 273 F.3d 481 (2nd Cir. 2001) 10, 15

Christensen v. Harris County, 529 U.S. 576 (2000) 17

Confederated Tribes & Bands of Yakima Indian Nation v. FERC, 746 F.2d 466 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985) 20

Dubois v. Department of Agriculture, 102 F.3d 1273 (1st Cir. 1996) 15

EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200 (1976) 12

First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946) 22

Helvering v. Morgan's Inc., 293 U.S. 121 (1934) 12

National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988) 11, 15, 16

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 9, 11, 16

North Carolina v. FERC, 112 F.3d 1175 (D.C. Cir. 1997) 5, 16

TABLE OF AUTHORITIES – Continued

Page

Oregon Natural Desert Ass'n v. Dombeck, 172 F.3d 1092 (9th Cir. 1998), *cert. denied*, 528 U.S. 964 (1999) 15

PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994) ..... *passim*

S.D. Warren Co. v. FERC, No. 04-1105 (D.C. Cir., filed May 6, 2005) 2

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 17

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Wisconsin Pub. Serv. Corp. v. FERC, 32 F.3d 1165 (7th Cir. 1994) 22

STATE COURT DECISION

S.D. Warren v. Board of Environmental Protection, 2005 ME 27 1

AGENCY DECISIONS

Bangor Hydro-Electric Company, 83 F.E.R.C. ¶ 61,038 (1998) 1

Bangor Hydroelectric Company, 86 F.E.R.C. ¶ 62,242 (1999) 1

Central Maine Power Company, 82 F.E.R.C. ¶ 61,191 (1998) 23

Central Maine Power Company, 81 F.E.R.C. ¶ 61,249 (1997) 1

Central Maine Power Company, 65 F.E.R.C. ¶ 62,154 (1993) 1

TABLE OF AUTHORITIES – Continued

Page

City of Augusta, Georgia, 109 F.E.R.C. ¶ 61,210 (2004) .. 17, 18

FPL Energy Maine Hydro LLC, 101 F.E.R.C. ¶ 62,179 (2002) 1

FPL Energy Maine Hydro LLC, 111 F.E.R.C. ¶ 61,104 (2005) 13, 15, 17, 20

Great Northern Paper Company, 44 F.E.R.C. ¶ 62,368 (1988) 1

Kennebec Water District, 88 F.E.R.C. ¶ 61,117 (1999) 1

Maine Public Service Company, 65 F.E.R.C. ¶ 62,215 (1993) 1

Ridgewood Maine Hydro Partners, L.P., 105 F.E.R.C. ¶ 62,137 (2003) 1

S.D. Warren Company, Orders Issuing New Licenses, October 2, 2003, 105 F.E.R.C. ¶¶ 61,009 to 61,013 ..... 2, 18, 24

Town of Madison-Department of Electric Works, 81 F.E.R.C. ¶ 61,252 (1997) 1

FEDERAL STATUTES

16 U.S.C. §§ 791a *et seq* 4, 6

16 U.S.C. § 799 22

16 U.S.C. § 808(a) 20

33 U.S.C. §§ 1251 *et seq* 1

33 U.S.C. § 1251(a) 13

33 U.S.C. § 1251(a)(1) 12

33 U.S.C. § 1251(a)(2) 12

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. § 1251(b) 13

33 U.S.C. § 1313(c)(2)(a) 12

33 U.S.C. § 1341 ..... *passim*

33 U.S.C. § 1341(a) 11

33 U.S.C. § 1341(a)(3) 21

33 U.S.C. § 1341(a)(5) 21

33 U.S.C. § 1341(d) 8, 20, 21

33 U.S.C. § 1342 ..... *passim*

33 U.S.C. § 1342(a) 11

33 U.S.C. § 1362 ..... 5, 11, 19

33 U.S.C. § 1362(6) 3

33 U.S.C. § 1362(12) 11

33 U.S.C. § 1362(16) 5, 11

33 U.S.C. § 1362(19) 13

MAINE STATUTES

Me. Rev. Stat. Ann., Tit. 38, §§ 464 *et seq.* 2

FEDERAL REGULATIONS

18 C.F.R. § 4.34(b)(5) 17

18 C.F.R. § 4.34(b)(5)(i) 2, 17

18 C.F.R. § 16.8 ..... 2, 17

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Maine Legislative Document 2283 (112th Legis. 1986) 2

MAINE'S BRIEF IN OPPOSITION

Respondent Maine Department of Environmental Protection respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision and judgment of the Maine Supreme Judicial Court, sitting as the Law Court, issued February 15, 2005, reproduced in the Appendix to the Petition for Writ of Certiorari ("App.") at A-1 to A-18, and reported at 2005 ME 27.

STATEMENT OF THE CASE

I. Factual Background

The parties agree that the material facts are generally undisputed. For more than fifteen years the Maine Department of Environmental Protection ("DEP") has been issuing water quality certifications, pursuant to section 401 of the Federal Water Pollution Control Act, known as the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, 33 U.S.C. § 1341 ("Section 401"), for the licensing of existing hydropower projects by FERC on the grounds that releases of water from a dam constitute "any discharge," whether or not the releases meet the definition of "discharge of pollutants."[1] Likewise, FERC's regulations require that applicants for an

[1] *See, e.g., Ridgewood Maine Hydro Partners, L.P.*, 105 F.E.R.C. ¶ 62,137 (2003); *FPL Energy Maine Hydro LLC*, 101 F.E.R.C. ¶ 62,179 (2002); *Bangor Hydroelectric Company*, 86 F.E.R.C. ¶ 62,242 (1999); *Kennebec Water District*, 88 F.E.R.C. ¶ 61,117 (1999); *Bangor Hydro-Electric Company*, 83 F.E.R.C. ¶ 61,038 (1998); *Central Maine Power Company*, 81 F.E.R.C. ¶ 61,249 (1997); *Town of Madison-Department of Electric Works*, 81 F.E.R.C. ¶ 61,252 (1997); *Maine Public Service Company*, 65 F.E.R.C. ¶ 62,215 (1993); *Central Maine Power Company*, 65 F.E.R.C. ¶ 62,154 (1993); *Great Northern Paper Company*, 44 F.E.R.C. ¶ 62,368 (1988).

original license or for relicensing file a water quality certification or waiver thereof by the state, without regard to whether the applications propose a "discharge of pollutants." 18 C.F.R. §§ 4.34(b)(5)(i), 16.8.

Documents issued by FERC in the course of the FERC licensing of petitioner's dams demonstrate that FERC anticipated that Maine would issue a water quality certification for the projects. *See, e.g.*, Law Court Appendix ("Law Court App.") at 119, 238. FERC has now issued forty-year licenses for these dams incorporating all conditions – including the "reopeners" – of Maine's water quality certification without comment. *S.D. Warren Company, Orders Issuing New Licenses*, October 2, 2003, 105 F.E.R.C. ¶¶ 61,009 to 61,013 ("*FERC Licenses*").[2]

The five dams in issue here were constructed in the early 1900s, but were not licensed by FERC until between 1979 and 1981. App. at A-2. This is the first time that Maine's existing water quality laws, which were substantially revised in 1986,[3] have been applied to petitioner's projects.

All of the dams are located on the Presumpscot River and are operated in a run-of-river mode, with outflow being approximately equal to inflow. App. at A-2. The dams provide electricity for petitioner's downstream paper mill. *Ibid.* Each dam has a "bypass reach" between the

[2] Petitioner appealed FERC's licensing orders to the Court of Appeals for the District of Columbia Circuit on grounds separate from those raised here. The court recently denied the petition for review. *S.D. Warren Co. v. FERC*, No. 04-1105 (D.C. Cir., filed May 6, 2005).

[3] *See* Maine Legislative Document 2283 (112th Legis. 1986); Me. Rev. Stat. Ann., Tit. 38, §§ 464 *et seq.* (West 2001 & Supp. 2004).

dam and the downstream end of the tailrace channel, from which water is diverted to run the turbines. App. at A-75 to A-77. Water is run through the turbines, enters the tailrace and then is discharged back to the river at the end of the tailrace. *Ibid.* In addition, the bypass reaches receive both leakage and spillage flows, and petitioner proposed additional flows for those reaches upon relicensing. App. at A-78 to A-81. None of the dams add "pollutants" as that term is defined in Section 502(6) of the Clean Water Act. 33 U.S.C. § 1362(6).

It is undisputed that the dams and their continuing operation adversely affect the water quality of the Presumpscot River, and lead to violations of water quality standards. The Board of Environmental Protection ("BEP") found[4] that certain of the dams "clearly cause or contribute to the current violation of dissolved oxygen standards in several parts of the Presumpscot River."[5] App. at A-51. The BEP further found:

> Warren's dams have caused long stretches of the natural river bed to be essentially dry and thus unavailable as habitat for indigenous populations of fish and other aquatic organisms; that the dams have blocked the passage of eels and sea-run fish to their natural spawning and nursery waters; that the dams have eliminated the

[4] The Law Court accepted the factual findings of the BEP and that determination is not at issue here. App. at A-12.

[5] Specifically, the BEP found that [w]ere these dams not in place and operating in such a way as to reduce natural reaeration, to increase time of travel, to increase water temperature, and to create settling basins for sediments and nutrients, dissolved oxygen standards would be met in the Gambo, Little Falls, and Sacarappa impoundments." *Ibid.*

> opportunity for fishing in long stretches of river, and that the dams have prevented recreational access to and use of the river.

App. at A-49.

II. Procedural Background

In April 2003, the DEP approved water quality certification for the continued operation of petitioner's projects, but attached conditions necessary to assure that the projects would comply with the State's water quality laws. A-74 to A-140. With regard to several of these conditions, the DEP required petitioner to conduct studies to assess the effectiveness of the measures required, the so-called "reopener" conditions. In these conditions, the DEP reserved the right, after notice to the petitioner and opportunity for hearing, to require reasonable changes to ensure continuing compliance with water quality standards. App. at A-124 to A-137 (Conditions 1(H), 3(F), 4(F), 5(G) and 6(F)).

Petitioner appealed the water quality certification first to the BEP (App. A-35 to A-73), then to the Maine Superior Court (App. A-19 to A-34), and finally to the Maine Law Court (App. A-1 to A-18). In each case, petitioner's argument that Maine lacked jurisdiction to issue a water quality certification was rejected, as was its contention that the reopener conditions exceeded the DEP's conditioning authority under the Clean Water Act and Maine law, and violated the Federal Power Act, 16 U.S.C. §§ 791a *et seq*. ("FPA").

III. Decision of the Maine Law Court

Before the Law Court, petitioner did not brief, and therefore the Law Court did not analyze, the import of *South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). With regard to petitioner's jurisdictional challenge, the Law Court first looked to the definition of "discharge" in Section 502 of the Clean Water Act, 33 U.S.C. § 1362 ("Section 502"). App. at A-9. Section 502(16) provides that when used without qualification, as here, "the term discharge . . . *includes* a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16) (emphasis added). The court found that "this statement of inclusion provides 'the nearest evidence we have of definitional intent by Congress'." App. at A-6 (*quoting North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997) ("*North Carolina*")). The court thus used the definition of "discharge of pollutants," as a guide to the meaning of "any discharge," finding that "an 'addition' is the fundamental characteristic of any discharge." App. at A-6 (citations omitted).

The Law Court reasoned that "water that has left its natural state and has been subjected to man-made control constitutes an 'addition' upon its return to the same navigable waterway." App. at A-10. Since this is an "addition," and since "*any addition* . . . is fundamental to the definition of discharge" under Section 401, the court held that "water that leaves the river and runs through the dam before returning to the river constitutes a discharge for the purposes of section [401]." App. at A-10 (emphasis added).

The Law Court similarly rejected petitioner's challenge of numerous certification conditions, including the reopener clauses. The Law Court found that:

> This authority is essential because if the conditions are not as effective as planned, the water quality standards will not be met and the BEP's goal to "restore and maintain the chemical, physical and biological integrity of the State's waters . . . " will not be achieved during the forty-year term of the FERC license.

App. at A-15 to A-16. The court thus found that the reopeners fit within the literal language of Section 401(d), which requires a certification to set forth "any" limitation "necessary to assure" compliance with water quality standards, 33 U.S.C. § 1341(d); and that they were consistent with this Court's broad reading of the states' conditioning authority in *PUD 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 713 (1994) (*"PUD 1"*). App. at A-13. The court further held that the reopeners were not prohibited by the FPA and were authorized under Maine law. App. at A-13 to A-16.

REASONS FOR DENIAL OF THE WRIT

There is no compelling reason for the Court to review the Maine Law Court's decision. Regarding the first question, petitioner's core argument was not evaluated in the briefs or by the Law Court below. The import of *Miccosukee*, its analysis of Section 402 of the Clean Water Act, 33 U.S.C. § 1342 ("Section 402"), and its application to Section 401 was not thoroughly briefed and argued to the Maine Law Court by petitioner. Neither *Miccosukee*, nor Section 402 itself was cited in petitioner's Law Court briefs or,

concomitantly, mentioned by the Law Court. In sum, the petition's principal argument was never fully analyzed by a lower court and, therefore, this issue is not appropriate for the Court's consideration. The Court should decline to consider it on this ground alone.

The foundation of the petition on the first question is that the Law Court's decision conflicts with this Court's decision in *Miccosukee*. No conflict exists because that case involved the issue of whether a National Pollutant Discharge Elimination System ("NPDES") permit was required *under Section 402*, and not whether a water quality certification was required *under Section 401*. Section 401 and Section 402 are different sections, with different language, different purposes, and a different history of interpretation by the courts and the EPA.

There is no conflict with the decisions of other courts. The Law Court's decision is consistent with decisions of the courts of appeal that have interpreted Section 401, both in the context of FERC licenses and in other contexts. While the interpretation of Section 401 by the Maine Law Court may contain nuances not yet employed by other courts, the approach is similar and results in the same outcome.

Significantly, the Law Court's decision fully conforms with EPA's interpretation of what constitutes a "discharge" under Section 401, and with FERC's regulations and long-standing practice and interpretation of the states' Section 401 certification authority. In this matter, moreover, FERC has incorporated the conditions contained in the certification in its newly issued licenses for the projects. In light of this, and the fact that Congress has given the states an

important role in protecting the water quality within their borders, the suggestion that the Maine Law Court was "complicit" in a "power grab" by the State of Maine, Petition for Writ of Certiorari ("Petition") at 9, is as unfounded as it is unfortunate.

Finally, there is no compelling reason for the Court to review the Law Court's decision upholding the reopener clauses in the certification. The Law Court's decision conflicts with no case law and is consistent with *PUD 1.* That case interpreted the states' conditioning authority under Section 401(d) broadly, declining to read an implied limitation thereof from FERC's licensing authority under the FPA. 511 U.S. at 721-723. *See also, American Rivers, Inc. v. FERC*, 129 F.3d 99, 111-112 (2nd Cir. 1997) (rejecting argument that requiring FERC to accept state-imposed reopener conditions conflicted with FERC's licensing authority under the FPA).

I. THE COURT SHOULD DENY THE WRIT ON THE FIRST QUESTION BECAUSE THE ISSUE NOW RAISED BY PETITIONER WAS NOT FULLY ARGUED BEFORE OR EVALUATED BY THE LAW COURT.

As revealed by petitioner's characterization of the first question, the core issue it wishes to argue on appeal is the application of *Miccosukee* to Section 401, or more particularly, whether a "discharge" under Section 401 "requires the addition of water from a distinct body of water," as does a "discharge of pollutants" under Section 402. This question, however, was never squarely argued to or considered by the Maine Law Court, and this Court should decline to consider it here. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997) (except for very rare exceptions, in

reviewing state court judgments, Court will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court).

Petitioner failed to cite to *Miccosukee*, Section 402 or the cases interpreting Section 402 on which it now relies for support of the "addition from a distinct body of water" test. Petition at 17.[6] Petitioner attempted to bring *Miccosukee* to the Law Court's attention after oral argument, notwithstanding that the case had been decided four months before petitioner filed its brief on the merits and eight months before argument.[7] Petitioner made no motion to supplement its brief, or for reconsideration on the basis of this argument; and the decision of the Law Court never addresses *Miccosukee* or its application to this case. Because of the manner in which petitioner litigated this matter, the Law Court did not explore or evaluate this issue, and it is improper to present it in these circumstances to this Court.

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[6] Petitioner cited *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) for the separate proposition that the dams in question do not discharge "pollutants," a proposition never contested in this case. Law Court Brief of S.D. Warren Co. at 13.

[7] Letter to James Chute, Clerk of the Law Court, from Matthew D. Manahan, dated January 7, 2005.

II. THE MAINE LAW COURT'S DECISION APPLYING SECTION 401 DOES NOT CONFLICT WITH *MICCOSUKEE* AND ITS INTERPRETATION OF SECTION 402, BECAUSE THESE SECTIONS USE DIFFERENT LANGUAGE AND HAVE DIFFERENT PURPOSES.

In *Miccosukee*, the Court considered whether the activity involved a "discharge of pollutants," and therefore whether a NPDES permit was necessary under Section 402. The Law Court in this case was asked to consider whether the projects "may result in any discharge," and thus require a certification under Section 401. *Miccosukee*, and the line of cases upon which it relies, do not involve the same question of law as was before the Law Court, which was considering a separate section of the Clean Water Act that uses different language and has a different purpose.

The Court held in *Miccosukee* that pumping water from one part of a water body into another part of the same water body does not constitute an "addition" of pollutants, and thus does not require a NPDES permit. *Miccosukee*, 541 U.S. at 109-110. In making this determination, the Court relied on *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2nd Cir. 2001). *Ibid. Trout Unlimited* described a line of precedent holding that dams do not require NPDES permits under Section 402, because (1) they "add" nothing to the water; and (2) dam-induced water quality impacts are not "pollutants." *Trout Unlimited*, 273 F.3d at 491-492. These cases were based in large part on deference to EPA's interpretation of Section 402. *See Gorsuch*, 693 F.2d at 164-166, 182; *see also National Wildlife Federation v.*

Consumers Power Co., 862 F.2d 580, 584-586 (6th Cir. 1988).

Section 402 and Section 401, however, use different terms that are separately defined. Section 402 requires a permit for "the discharge of any pollutant" under the NPDES program. 33 U.S.C. § 1342(a). Section 401, on the other hand, requires state certification for "any activity . . . which may result in *any discharge* into the navigable waters." 33 U.S.C. § 1341(a) (emphasis added). The term "discharge of pollutants" is defined to "*mean*[] . . . any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). "Discharge" is defined by a statement of inclusion:

> The term "discharge" when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants.

33 U.S.C. § 1362(16) (emphasis added). The term "discharge" thus encompasses a broader class of activities than a "discharge of pollutants."

To accept that "discharge" in Section 401 is limited to "discharge of pollutants" in Section 402, as petitioner urges, would require reading "means" synonymously with the word "includes." However, "[u]nder the usual rules of statutory interpretation, use of two different terms is presumed to be intentional." *Gorsuch*, 693 F.2d at 172 (citation omitted). In Section 502 of the Clean Water Act, Congress has employed "means" for every one of the 23 definitions listed, except the definition of "discharge," which uses the term "includes." As stated by this Court in a different context:

> The natural distinction would be that where "means" is employed, the term and its definition

> are to be interchangeable equivalents, and that the verb "includes" imports a general class, some of whose particular instances are those specified in the definition.

Helvering v. Morgan's Inc., 293 U.S. 121, 125-126, n. 1 (1934).

The use of the separate terms comports with the purposes and intent of the two sections. Section 402 was enacted by Congress as part of the 1972 amendments to the Federal Water Pollution Control Act with the goal that the "discharge of pollutants into the navigable waters be eliminated by 1985," 33 U.S.C. § 1251(a)(1). *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 203 (1976). This was to be accomplished by the creation of strict technology-based restrictions for discharges of pollutants from point sources. *Id.* at 204-205. The NPDES permit program in Section 402 was established "as a means of achieving and enforcing effluent limitations." *Id.* at 206.

Section 401, on the other hand, is the means by which states may apply their water quality standards to federally licensed activities. Water quality standards provide a "supplementary basis," upon which to protect water quality. *PUD 1*, 511 U.S. at 704 (citation omitted). Water quality standards consist of, among other things, designated uses of the navigable waters, including the protection and propagation of fish and wildlife and recreation in and on the water. 33 U.S.C. §§ 1251(a)(2), 1313(c)(2)(a). The protection of these uses plainly requires conditions that go beyond simply restricting the discharge of pollutants. In *PUD 1*, the Court held that the states' conditioning authority under Section 401 extended to the establishment of minimum flows for the protection of fish. *PUD 1*, 511 U.S. at 719-720. It would

make little sense for Congress to require the states to establish designated uses of their waters, give them broad conditioning authority under Section 401 to protect those uses, and then restrict the use of this authority to the narrow range of facilities that discharge "pollutants."

In addition, as the record in this case demonstrates, dam-induced changes to water quality, while not constituting a "discharge of pollutants," are nonetheless "pollution." 33 U.S.C. § 1362(19) ("[t]he term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water"). Congress recognized the "primary responsibilities and rights of States to prevent, reduce, and eliminate *pollution*." 33 U.S.C. § 1251(b) (emphasis added). Both the rights of the states, reserved in Section 101(b), 33 U.S.C. § 1251(b), and the goal of the Clean Water Act to restore the "chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), are advanced by Congress's choice of the term "any discharge" in Section 401. *See FPL Energy Maine Hydro LLC*, 111 F.E.R.C. ¶ 61,104, ¶ 21 (2005). The decision of the Maine Law Court in *S.D. Warren* is therefore a logical interpretation and application of Section 401 to dams that have potential to alter, and have altered the water quality of the rivers, even though they do not involve a "discharge of pollutants."

In *Miccosukee,* the Court did not have before it the issue of what constitutes a "discharge" under Section 401, and thus never considered the language of Section 401, its purpose or its interpretation by the EPA or the courts. To state that the Law Court's decision "directly contradicts this Court's decision in *Miccosukee*," Petition at 8, is therefore to misstate the holding in that case. Moreover, to claim that the reasoning in *Miccosukee* applies to Section

401 ignores the critical factors distinguishing Section 401 and Section 402.

III. THE LAW COURT'S DECISION REGARDING WHAT CONSTITUES A DISCHARGE UNDER SECTION 401 DOES NOT CONFLICT WITH THE DECISIONS OF UNITED STATES COURTS OF APPEALS, AND IS CONSISTENT WITH THE LONGSTANDING INTERPRETION BY THE EPA AND FERC.

A. The Law Court's Decision is Consistent with Decisions of United States Courts of Appeals.

Petitioner's arguments now appear to be two-fold: no Section 401 certification is needed because, first, there is no discharge of "pollutants," and, second, there is no addition from a separate body of water. The Maine Law Court rejected petitioner's claim that a "discharge" under Section 401 is limited to a "discharge of pollutants," and concluded that "water that has left its natural state and has been subjected to man-made control constitutes an 'addition' upon its return to the same navigable waterway." App. at A-8 to A-10.

No case has held that a prerequisite to Section 401 certification is the discharge of "pollutants," and the difference in language and purpose discussed above supports the Law Court's conclusion to the contrary. Similarly, no case has held that relicensing of a dam does not result in an "addition" to the river for purposes of Section 401 certification because dam releases come from the same body of water.

In *Alabama Rivers Alliance v. FERC*, 325 F.3d 290 (D.C. Cir. 2003), which involved a proposed amendment to an existing FERC license, the Court of Appeals for the District of Columbia Circuit[8] concluded that flows of water through a dam constituted a "discharge" triggering Section 401, even though the flows were from the same body of water and contained no "pollutants." *Id.* at 293-294. The court found that "the word 'discharge' [in Section 401] contemplates the *addition* . . . of a substance or substances," *Alabama Rivers*, 325 F.3d at 299 (citation omitted) (emphasis in original), and increased flow of water was found to be such a discharge.[9] *Cf. Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998), *cert. denied*, 528 U.S. 964 (1999) ("'discharge' [in Section 401] is the broader term because it includes all releases from point sources, whether polluting or not polluting. . . . This is the logical interpretation of § 1362(16) that comports with the structure and lexicon of the Clean Water Act").

The Court of Appeals made no attempt to import wholesale into Section 401 the more narrow interpretation

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[8] The District of Columbia Circuit Court of Appeals is the only court of appeals that has interpreted "discharge" in Section 401 in the context of a FERC licensing proceeding. Other courts of appeals decisions now cited by petitioner in support of the so-called "outside world" test, Petition at 17, involve the interpretation of "discharge of pollutants" in the context of Section 402, and are therefore inapposite. *See Trout Unlimited*, 273 F.3d 481; *Consumers Power*, 862 F.2d 580; *Dubois v. Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996).

[9] The fact that *Alabama Rivers* involved an increase of flow in the context of a license amendment is immaterial to this case because a relicensing involves "a new commitment of public resources for the term of the new license, rather than a continuation of the *status quo*." *FPL Energy*, 111 F.E.R.C. ¶ 61,104. Thus, a relicensing may always be said to involve "new" or "added" flows, whether or not an increase is proposed. *See* discussion *infra* at 20.

of "addition," as applied to Section 402 in a line of cases beginning with its own opinion in *Gorsuch*, 693 F.2d 156. The court instead recognizes that the "focus of [the definition of 'discharge of pollutants'] is on the regulation of pollutants *rather than the general regulation of project discharges*." *North Carolina*, 112 F.3d at 1187 (emphasis added). *See also PUD No. 1*, 511 U.S. at 711 (no dispute that certification was required where petitioners "concede that, at a minimum, the project will result in two possible discharges," including "the discharge of water at the end of the tailrace after the water has been used to generate electricity").

B. The Law Court Decision is Consistent with the Interpretations of EPA and FERC.

The Maine Law Court's decision is consistent with the interpretation of Section 401 by the EPA. In its *amicus curiae* brief supporting affirmance in *PUD No. 1*, 511 U.S. 700, the Solicitor General wrote on behalf of the United States, including the EPA, that "when the operator of the dam releases water through a crest-gate, sluice-gate, release valve, or other similar device, it has caused a discharge within the meaning of Section 401." *Brief for the United States as Amicus Curiae Supporting Affirmance*, 1992 U.S. Briefs 1911. Law Court App. at 272. In support of this position, the Solicitor General found that "Congress employed the term 'discharge' when used without qualification (as in Section 401(a)) more broadly than the term 'discharge of any pollutant'." *Ibid.* The Solicitor specifically recognized the Section 401-Section 402 distinction:

> Petitioners cite [*Consumers Power* and *Gorsuch*] for the proposition that hydropower structures do not cause a "discharge" that may be addressed under Section 401. Those cases, however, involve the scope of the term "discharge of any pollutant" under Section 402.

Ibid.

The EPA is the agency charged with implementing the Clean Water Act, including Section 401. *Alabama Rivers*, 325 F.3d at 296-297. There is no reason to believe that the formal position of an *amicus* brief submitted to this Court does not reflect the agency's "fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997). As such it is entitled to deference. *Id.* at 462. At the very least, EPA's interpretation, which conforms to the plain language of the statute, is highly persuasive, and is thus "entitled to respect," representing as it does "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944); *see also Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

Similarly, FERC's regulations require certification for all license and relicensing applications, without regard to whether the water above and below the dam are from the same water body or the discharge contains a "pollutant." 18 C.F.R. §§ 4.34(b)(5)(i), 16.8. *City of Augusta, Georgia*, 109 F.E.R.C. ¶ 61,210, ¶ 12 (2004) (suggestion that the operation of a hydroelectric project does not require Section 401 certification is "inconsistent with [18 C.F.R. § 4.34(b)(5)] and with long-standing practice").

FERC has recently addressed the question of whether the proposed relicensing of a dam that involves no "discharges of pollutants," results in a "discharge" under Section 401 requiring state certification. *FPL Energy Maine Hydro LLC,* 111 F.E.R.C. ¶ 61,104. FERC specifically

rejected the same arguments made by the petitioner here, finding that: (1) a "discharge" does not require the addition of some substance to the water being discharged; (2) the plain meaning of the word "includes" shows that the definition of "discharge" is broader than, and thus not limited to, "discharge of pollutants"; and (3) relicensing necessarily "results" in a discharge, because without a new license, the discharge will not be authorized to continue. *Id.* at ¶¶ 17-25. FERC has also rejected the argument that the reasoning in *Miccosukee* applies to Section 401, and specifically that water quality certification cannot be required where water "is flowing continuously in the same river." *City of Augusta, Georgia*, 109 F.E.R.C. ¶ 61,210, ¶¶ 10-11.

FERC indicated the need for a certification in the course of licensing petitioner's projects. Law Court App. at 119, 238. FERC has now issued licenses for those projects that incorporate all conditions imposed by the water quality certification, and has given no indication that it disagrees with the State's assertion of Section 401 certification authority. *FERC Licenses*, 105 F.E.R.C. ¶¶ 61,009 to 61,013.

In short, there is no basis for petitioner's assertion that there is a split of authority with regard to the application of Section 401 to dam relicensings. Petitioner's list of four allegedly "distinct interpretations," Petition at 17, fails to take into account the distinction between Sections 401 and 402 and seizes on non-material differences in approach.

IV. THE MAINE LAW COURT'S DECISION DOES NOT CONFLICT WITH FERC'S LICENSING AUTHORITY UNDER THE FPA.

The Maine Law Court also found that the reopener clauses contained in the certification are within the scope of the DEP's conditioning authority under both Section 401(d) and Maine law, and are not prohibited by the FPA. App. at A-12 to A-16. These holdings do not conflict with any court opinions or FERC opinion, therefore arguing against consideration by this Court.

A. The Certification Was Within the Scope of the State's Authority Under Section 401.

The FPA creates a "broad federal role in the development and licensing of hydroelectric power." *American Rivers*, 129 F.3d at 111 (citation omitted). The Clean Water Act, however, has "diminished" the reach of the FPA by "expressly requiring the Commission to incorporate into its licenses state-imposed water-quality conditions." *Ibid.* Petitioner recognizes that "in adopting Section 401 of the CWA Congress intended to expand the scope of state involvement in federal licensing proceedings," Petition at 25, but argues that the lower court's decision impermissibly expands the scope of Section 401 in three ways. None of petitioner's arguments raises an issue meriting this Court's consideration.

Petitioner first reiterates its argument that a discharge must contain "pollutants" before triggering Section 401 review. As discussed above, petitioner's theory is contrary to the plain language of Sections 401 and 502, the decisions of the courts of appeal that have interpreted

those sections, and the interpretation by the agencies charged with their implementation.

Petitioner next contends that the Maine Law Court erred because relicensing will not "result in" any new discharge in this case, as required by Section 401, but will merely authorize the continuation of a pre-existing discharge. This argument ignores the nature of project relicensing under the FPA, as FERC recently held when presented with the identical issue:

> We disagree. Relicensing *represents a new commitment of public resources* for the term of the new license, rather than a continuation of the *status quo*. The project needs a new license to continue operating and must ultimately shut down if a new license cannot be obtained. Thus, any pre-existing discharge will not be authorized to continue in the future unless a new license is obtained.

FPL Energy, 111 FERC ¶ 61,104, ¶ 25 (emphasis added) (citation omitted). *See also* 16 U.S.C. § 808(a) ("the Commission is authorized to issue a new license . . . upon such terms and conditions as may be authorized or required under the then existing laws and regulations"); *see also Confederated Tribes & Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 470 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985) (FERC must "make the same inquiries on relicensing as on initial licensing").

Finally, petitioner argues that Section 401 does not authorize "reopeners." Section 401(d) provides that any certification "shall set forth *any* effluent and other limitations . . . *necessary to assure* that any applicant for a Federal license or permit will comply" with the State's water quality standards. 33 U.S.C. § 1341(d) (emphasis

added). In interpreting this section, this Court confirmed that "States may condition certification upon *any* limitations necessary to ensure compliance with state water quality standards." *PUD 1*, 511 U.S. at 713 (emphasis added). The Maine Law Court found that the reopeners were "essential" to ensure that water quality standards would be met for the forty-year term of the license. App. at A-15 to A-16. The Maine Law Court thus rightly found that the reopener clauses "fit within both the literal language of Section 401(d)" and the statutory interpretation of that section by this Court.[10]

B. The Maine Law Court's Decision Does Not Conflict with the FPA Which Contains No Implied or Express Limitation on the States' Authority Under Section 401.

The Maine Law Court held that the reopeners were not only authorized by Section 401(d), 33 U.S.C. § 1341(d), but also that the FPA did not prohibit reopeners. App. at A-13 to A-14. Nothing in the case law or the statute conflicts with that holding.

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[10] Petitioner's reliance on Section 401(a)(5), 33 U.S.C. § 1341(a)(5), is misplaced. Petition at 22. This provision provides a remedy – the suspension or revocation of the federal license – in the event of a project's violation of the Clean Water Act, including the conditions contained in the certification. It does not speak to what the conditions of that certification may or may not be. Similarly, Section 401(a)(3), 33 U.S.C. § 1341(a)(3), does not speak to whether a state may reserve the right to reopen a condition of certification during the term of a license; but rather to the need for an additional certification when a project requires an operating permit from a separate federal agency than that issuing the construction permit.

Petitioner argues that Section 6 of the FPA, 16 U.S.C. § 799, expressly prohibits states from attaching reopeners to their certification conditions because it prohibits the alteration of licenses except upon mutual agreement between the licensee and FERC. Petition at 26. While the issue has not been addressed in the context of a Section 401 certification, courts have rejected the argument that Section 6 prohibits reopeners in FERC licenses. Finding that Section 6 "must not be given a construction which is impracticable of application," the Court of Appeals for the Ninth Circuit held that FERC may include reopeners in licenses where it is reasonably foreseeable that a need for further measures may develop, but "either the dimensions of the need or the way of meeting it is not presently ascertainable." *California v. FPC*, 345 F.2d 917, 924-925 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965) (upholding reopener clause in FERC license allowing FERC to re-evaluate minimum flows after twenty years); *see also Wisconsin Pub. Serv. Corp. v. FERC*, 32 F.3d 1165, 1168-1169 (7th Cir. 1994) (upholding reopener clause in FERC license requiring dam owner to provide such fishways as might in the future be prescribed by the Secretary of the Interior).

Petitioner next contends that FERC's primacy in hydropower project licensing, recognized first by this Court in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946), implicitly limits the states' authority under Section 401. The *First Iowa* line of cases cited by petitioner, however, did not seek to limit the exercise of a state's authority granted by Congress under Section 401, but rather a state's authority to regulate hydropower projects under state statute. These cases are plainly distinguishable from the case at hand. While the FPA has a wide preemptive reach with regard to state statutes

seeking to regulate hydropower projects, "[t]he CWA . . . has diminished this preemptive reach." *American Rivers*, 129 F.3d at 111.

Petitioner ignores this Court's more recent decision in *PUD 1*, 511 U.S. 700, where the Court addressed the issue of whether FERC's broad licensing authority under the FPA implicitly limits the states' conditioning authority under Section 401(d). *Id.* at 721-723. In that case, the Court specifically declined to limit the states' authority under Section 401, rejecting the assertion that the states' conditioning authority conflicted with FERC's "comprehensive authority" under the FPA. *Id.* at 720-721. The Court held that because Section 401 applies to statutes and regulatory schemes in addition to the FPA, and because any conflict in that case was hypothetical, it was "unwilling to read implied limitations into § 401." *Ibid.*

In *American Rivers*, 129 F.3d 99, the court held that FERC could not refuse to include state-imposed certification conditions in a FERC license, including reopeners. *Id.* at 112. The court reasoned that the inclusion of such conditions was not incompatible with the 1986 amendments to the FPA, as petitioner claims here, as long as the licensee may appeal those conditions in a court of proper jurisdiction as outside the scope of Section 401, and FERC may refuse to issue a license. *See also Central Maine Power Co.*, 82 F.E.R.C. ¶ 61,191 (1998) ("under the recent decision in *American Rivers* [citation omitted] a state may modify a water quality certification when the state has reserved such authority in the certification").

Here, petitioner has appealed the reopeners as outside the scope of Section 401 conditioning authority, and FERC chose not to deny the permit. To the contrary, FERC has

issued the licenses and included the reopeners without comment or objection. *FERC Licenses*, 105 FERC ¶¶ 61,009 to 61,013. FERC's licensing authority under the FPA has thus been adequately protected. *American Rivers*, 129 F.3d at 112. Moreover, any conjecture that the exercise of those reopeners sometime in the future would conflict with some action of the FERC is merely hypothetical. The State could decide not to exercise its rights under the reopeners. Assuming the DEP chose to impose further conditions on the license based upon the studies required, petitioner would have the right to contest and appeal those conditions. It is more appropriate to consider the reopener issue in a clear factual context, rather than a hypothetical situation which may never come to pass.

In sum, petitioner has failed to show that the issuance of the certification, and in particular the reopener provisions contained therein, conflicts with any court opinion, exceeds the State's authority under Section 401, or is in conflict with the FPA or FERC's authority thereunder. There is thus no compelling need for this Court to clarify the state and federal role in hydropower relicensing as requested by petitioner.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

G. STEVEN ROWE
Attorney General

PAUL STERN
Deputy Attorney General

GERALD D. REID
Assistant Attorney General

CAROL A. BLASI
Assistant Attorney General
(*Counsel of Record*)

Six State House Station
Augusta, Maine 04333-0006
(207) 626-8582
Attorneys for Respondent

(2)

No. 04-1527

Supreme Court, U.S.
FILED
JUN 15 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For A Writ Of Certiorari
To The Maine Supreme Judicial Court

BRIEF FOR THE INTERVENORS IN OPPOSITION

SEAN MAHONEY
(*Counsel of Record*)
VERRILL DANA, LLP
One Portland Square
Portland, ME 04112
(207) 774-4000

RONALD A. KREISMAN
25 Page Street
Hallowell, ME 04347-1418
(207) 626-0248

Attorneys for Intervenors
American Rivers and Friends
of the Presumpscot River

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED BY PETITIONER

1. Does the mere flow of water through an existing dam constitute a "discharge" under Section 401, 33 U.S.C. § 1341, of the Clean Water Act, despite this Court's holding last year in *Miccosukee* that a discharge requires the addition of water from a distinct body of water?

2. Does the State of Maine's expansive application of Section 401 conflict with the Federal Energy Regulatory Commission's comprehensive licensing authority over hydroelectric generating projects under the Federal Power Act, 16 U.S.C. §§ 791a *et seq.*?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are Petitioner S.D. Warren Company, the owner and operator of five hydroelectric projects on the Presumpscot River (the "Projects"), Respondent Maine Department of Environmental Protection ("DEP"), the state agency that issued the Section 401 water quality certification at issue, and Intervenors American Rivers and Friends of the Presumpscot River, who have been parties in this action at all stages of administrative and judicial review. Pet. App. 18, 21, and 37.

RULE 29.6 STATEMENT

American Rivers is a not-for-profit corporation organized in Washington, D.C. Friends of the Presumpscot River is a non-profit entity organized pursuant to the Maine Nonprofit Corporations Act, 13 M.R.S.A. §§ 101-1406. Neither entity has a parent company nor has either issued stock. Each is recognized as tax exempt under Section 501(c)(3) of the Internal Revenue Code.

TABLE OF CONTENTS

	Page
Questions Presented by Petitioner	i
Parties to the Proceedings	ii
Rule 29.6 Statement	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Statement of the Case	1
Argument	3
Summary	3
1. Petitioner's First Question Presented for Review Fails, Procedurally and Substantively, to Meet the Standards for Granting Certiorari	4
A. Petitioner's Failure to Raise or Address the First Question Presented Before the SJC Requires Denial of Certiorari	4
B. The SJC's Decision That Petitioner's Projects Result in a Discharge Under Section 401 Is Consistent With Prior Decisions of This Court and Courts of Appeals	5
i. The SJC's Decision Does Not Conflict With *Miccosukee*	6
ii. The Maine SJC's Decision Does Not Conflict With Other Decisions of This Court or Courts of Appeals	7
iii. The Application of Section 401 Requires No Clarification From This Court	12

TABLE OF CONTENTS – Continued

Page

2. The Second Question Presented By Petitioner Does Not Present A Conflict Or Controversy That Merits This Court's Review 13

Conclusion 15

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alabama Rivers Alliance v. FERC, 325 F.3d 290 (D.C. Cir. 2003) 9, 11, 12

California v. FERC, 495 U.S. 490 (1990) 13

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2nd Cir. 2001) 8, 12

Dubois v. Department of Agriculture, 102 F.3d 1273 (1st Cir. 1996) 7, 12

Illinois v. Gates, 462 U.S. 213 (1982) 4

Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988) 7, 12

North Carolina v. FERC, 112 F.3d 1175 (D.C. Cir. 1997) 9, 10, 11, 12

Oregon Natural Desert Ass'n v. Dombeck, 172 F.3d 1092 (9th Cir. 1998) 12

PUD No. 1 v. Washington Dep't of Ecology, 511 U.S. 700 (1994) ..... *passim*

South Florida Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95 (2004) 3, 4, 6, 7, 8

Yee v. City of Escondido, 503 U.S. 519 (1992) 5

STATE CASES

Power Authority of New York v. Williams, 101 A.D.2d 659 (1989) 12

S.D. Warren Co. v. Board of Environmental Protection, 2005 ME 27 (2005) 1

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

18 C.F.R. § 4.34(b) 3
18 C.F.R. § 4.38(f)(7) 14
18 C.F.R. § 16.8 14
28 U.S.C. § 1257(a) 1
33 U.S.C. § 1341(a)(1) 2, 7
33 U.S.C. § 1341(d) 3, 14
33 U.S.C. § 1311(a) 7
33 U.S.C. § 1342 7
33 U.S.C. § 1342(a) 7
33 U.S.C. § 1362(16) 6

AGENCY DECISIONS

City of Augusta, Georgia, 109 F.E.R.C. ¶ 62,210 (2004) 12
City of Fort Smith, 42 F.E.R.C. ¶ 61,362 (1988) 13
In re Central Vermont Pub. Serv. Corp., 85 F.E.R.C. ¶ 61,410 (1998) 13
S.D. Warren Co., 105 F.E.R.C. ¶ 61,013 (2003) 3
Virginia Electric and Power Co., 77 F.E.R.C. ¶ 61,519 11

TABLE OF AUTHORITIES – Continued

Page

OTHER

Brief for Petitioner, *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700 (1994), 1993 WL 632338 9
Brief of the United States as Amicus Curiae, *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700 (1994) (1992 Lexis U.S. Briefs 1911) 9

OPINIONS BELOW

The decision of the Maine Supreme Judicial Court ("SJC") is reported at *S.D. Warren Co. v. Board of Environmental Protection,* 2005 ME 27 (2005). Pet. App. 1-18. The decision of the Maine Superior Court (Pet. App. 19-34) is unreported.

JURISDICTION

The judgment of the SJC was entered on February 15, 2005. Pet. App. 1. The petition for a writ of certiorari was filed on May 12, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Petitioner owns seven dams on the Presumpscot River, which stretches just 27 miles from Maine's Sebago Lake to the Atlantic Ocean. Six of Petitioner's dams generate electricity by removing water from the Presumpscot, running that water through turbines, and then discharging that water back into the Presumpscot. In 2001, five of those dams (the "Projects") required new licenses from the Federal Energy Regulatory Commission ("FERC") in order to continue operating. Current operations of the Projects prevent the Presumpscot River from meeting its water quality standards.[1]

[1] The DEP made this finding, *see* Pet. App. 88-89, 106-107, 111-112, 116, and it was affirmed by three reviewing tribunals. Pet. App. 12, 25-33, and 49. Specifically, Petitioner's Projects significantly alter the

(Continued on following page)

Petitioner's Projects are licensed by FERC. Section 401 of the Clean Water Act ("CWA") requires that any applicant for a federal license whose operations "may result in any discharge into the navigable waters" obtain a certification from the affected state that such discharge will comply with state water quality standards. 33 U.S.C. § 1341(a)(1).

In 1999, Petitioner filed applications to renew the FERC licenses for its Projects that were to expire in 2001. As required by Section 401, Petitioner also filed applications with the Maine Department of Environmental Protection ("DEP") for water quality certification. As is routine with virtually all states in FERC relicensing procedures, Maine reviewed the impacts of Petitioner's Projects on the Presumpscot's ability to meet its water quality standards. The Maine DEP then issued its Section 401 certification in April 2003, with conditions that DEP determined were necessary to ensure that operation of the Projects will not continue to violate those water quality standards. Pet. App. 121-139. As required by the CWA and its own regulations, FERC incorporated Maine's Section

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chemical, physical and biological nature of the Presumpscot River by impounding the water above each of its dams, then removing the water from the river and running it through its turbines to generate electricity, and then discharging that water back into the Presumpscot River, often times leaving that portion of the riverbed just below the dam (known as bypass reaches) devoid of any water. The Maine Board of Environmental Protection found, and Petitioner did not contest, that Petitioner's Projects have caused long stretches of the natural river bed to be essentially dry and thus unavailable as habitat for indigenous populations of fish and other aquatic organisms; that the Projects have blocked passage of eels and sea-run fish to their natural spawning and nursery waters; that the Projects have eliminated the opportunity for fishing in long stretches of the river; and that the dams have prevented recreational access to and use of the river. Pet. App. 49.

401 certification and its conditions into the renewed licenses for the Projects ultimately issued to Petitioner. 33 U.S.C. § 1341(d); 18 C.F.R. § 4.34(b).

Petitioner unsuccessfully challenged the Maine DEP's Section 401 certification before the Board of Environmental Protection, Pet. App. 35-73, the Superior Court, Pet. App. 19-34, and the SJC, Pet. App. 1-18. Petitioner also unsuccessfully challenged the FERC licenses themselves which, based on the recommendation of FERC and other federal agency staff and independent of the Section 401 certification, incorporated into the licenses almost the same conditions as contained in the Section 401 certification. *S.D. Warren Co.*, Project Nos. 2897-003, 2932-003, 2941-002, 2931-002 and 2942-005. 105 F.E.R.C. ¶ 61,013 (2003) ("FERC's Multi-Project Order").

In its petition for writ of certiorari, Petitioner argues for the first time that this Court's decision in *South Florida Water Mgmt. Dist. v. Miccosukee Tribe,* 541 U.S. 95 (2004), supports its assertion that its Projects should be exempt from Section 401 because they do not result in any discharge into the Presumpscot River. Petitioner also asserts that Maine's Section 401 certification represents a "power grab" by Maine usurping FERC's broad authority under the Federal Power Act.

ARGUMENT

Summary

This Court should deny this petition for certiorari for three basic reasons. First, Petitioner's first question presented does not warrant this Court's review because

Petitioner failed to raise it below and it was not addressed by the SJC and the lower tribunals. Second, the SJC's decision is consistent with the decisions of this Court and other Courts of Appeals on Section 401's applicability to hydroelectric projects and the authority of states to condition Section 401 certifications. This Court's decision in *Miccosukee* is not applicable to Section 401 and thus the SJC's decision does not conflict with it. And third, the SJC's decision is consistent with the practice of state and federal regulatory agencies applying Section 401 to hydroelectric projects; that practice requires no clarification by this Court. Certiorari should therefore be denied.

1. Petitioner's First Question Presented for Review Fails, Procedurally and Substantively, to Meet the Standards for Granting Certiorari.

A. Petitioner's Failure to Raise or Address the First Question Presented Before the SJC Requires Denial of Certiorari.

Petitioner contends that the SJC's decision directly conflicts with this Court's decision in *Miccosukee*. Pet. 7-17. Although *Miccosukee* was decided on March 23, 2004, well before briefing (September 2, 2004) and oral argument (November 16, 2004) was complete in the SJC, Petitioner failed to even cite *Miccosukee,* never mind to argue its merits. As such, the application of *Miccosukee* to a Section 401 certification was not addressed by the SJC.

It is well established that this Court does not consider issues that were not raised or considered in the lower courts. *See Illinois v. Gates,* 462 U.S. 213, 218 n.1 (1982) ("the Court developed the rule that a claim would not be considered here unless it had been either raised or

squarely considered and resolved in state court"). Only in "very rare exceptions" will the Court examine claims not addressed below when reviewing state court judgments. *Yee v. City of Escondido,* 503 U.S. 519, 533 (1992).

There are no such exceptional circumstances to merit review of Petitioner's first question presented here. On this basis alone, certiorari should be denied.[2]

B. The SJC's Decision That Petitioner's Projects Result in a Discharge Under Section 401 Is Consistent With Prior Decisions of This Court and Courts of Appeals.

Just as Petitioner now attempts to manufacture an issue that merits this Court's review, it attempts to manufacture a conflict between the SJC's decision and prior decisions of this Court and courts of appeals. No such conflict exists. Rather, courts have consistently found that the operation of hydroelectric projects such as Petitioner's involve at least one discharge when the project returns water back into the river after using it to generate electricity; therefore the licensing of such projects triggers Section 401, just as the SJC found in this case.

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[2] As noted above, Petitioner's appeal of the FERC licenses themselves was recently and summarily rejected. Intervenor's Appendix ("Inter. App.") 1. As such, even if this Court were to grant this petition for certiorari and ultimately to agree with Petitioner's argument, in whole or in part, Petitioner would still have to operate its Projects under its FERC licenses, which incorporate almost all of the conditions contained in the Section 401 certification. *See* FERC's Multi-Project Order, ¶ 61,013; Inter. App. 2-7.

i. The SJC's Decision Does Not Conflict with *Miccosukee*.

Petitioner claims that the SJC's decision is "directly contrary to this Court's decision in *Miccosukee*" and that the SJC "erroneously ignored *Miccosukee*." Pet. 9, 13. Even if the Court were willing to overlook Petitioner's failure to even raise *Miccosukee* below, Petitioner's argument fails because it ignores the clear limits of *Miccosukee* and the fundamental difference between Section 401 and Section 402 of the CWA.

The issue addressed by the Court in *Miccosukee* was what constituted a "discharge of a pollutant" under Section 402 of the CWA. *Miccosukee*, 541 U.S. at 102-103. The Court's opinion did not address in any manner what constituted the more broadly and separately defined scope of "any discharge" under Section 401. 33 U.S.C. § 1362(16). As such, this Court did not address the distinction between Section 402's "discharge of pollutant" and Section 401's "any discharge." Moreover, because neither the legal nor factual issues in *Miccosukee* were suitably raised or developed below, the Court remanded without reaching any final decision on either issue. *Id.* at 112. In light of *Miccosukee's* substantive limitation to Section 402 and its procedural limitation of an undeveloped record, Petitioner's attempt to stretch the *Miccosukee* decision as one relevant to the SJC's decision of what constitutes "any discharge" under Section 401 should be rejected.

Moreover, Section 402 is fundamentally different than Section 401. The former's purpose is to regulate the discharge of pollutants to navigable waters by requiring a National Pollutant Discharge Elimination System ("NPDES") permit issued under Section 402 before "the

discharge of any pollutant by any person" to navigable waters is allowed. 33 U.S.C. §§ 1311(a), 1342. Section 401's purpose is quite different – to give states the ability to ensure that federally licensed projects (i.e., licensing that is not controlled by the state in which a project is situated) including hydroelectric projects will comply with the state's water quality standards. *See PUD No. 1 v. Washington Dep't of Ecology,* 511 U.S. 700, 707-08 (1994). Section 401's cooperative federalism approach to protecting and improving water quality is clearly broader than Section 402. That difference is reflected in how Congress limited Section 402's application to the "discharge of any *pollutant*" as opposed to Section 401's application to any federally licensed activity that "may result in *any discharge*." 33 U.S.C. §§ 1341(a)(1), 1342(a).

Miccosukee addresses only what constitutes a "discharge of a pollutant" under Section 402 and is therefore limited to the question of whether an NPDES permit is required for the activity in question. The SJC's decision addresses what constitutes "any discharge" under Section 401. As such, the conflict that Petitioner claims to exist between the SJC's decision and this Court's decision in *Miccosukee* is illusory.

ii. The Maine SJC's Decision Does Not Conflict With Other Decisions of This Court or Courts of Appeals.

The same illusory tension exists between the SJC's decision and the decisions cited by Petitioner. Specifically, each of the pre-*Miccosukee* cases that Petitioner claims the SJC decision conflicts with – *Nat'l Wildlife Fed'n v. Consumers Power Co.,* 862 F.2d 580 (6th Cir. 1988), *Dubois v. Department of Agriculture,* 102 F.3d 1273 (1st Cir. 1996)

and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,* 273 F.3d 481 (2nd Cir. 2001) – addressed whether an NPDES permit under Section 402 was necessary. None of them addressed Section 401 in general nor what constituted "any discharge" under Section 401 in particular. Thus, the interpretations of what constitutes an "addition" and thus a discharge of pollutants under Section 402 by these three Courts of Appeals are, like this Court's decision in *Miccosukee,* not applicable to what constitutes "any discharge" under Section 401.

Petitioner also tries to create tension between the cases that have addressed what constitutes "any discharge" under Section 401 and the SJC's decision. But its efforts to do so, which include all but ignoring this Court's decision in *PUD No. 1,*[3] are unavailing.

In *PUD No. 1,* the petitioner conceded that the hydroelectric project at issue would "at a minimum result in two possible discharges – the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity." *PUD No. 1,* 511 U.S. at 711. Although conceded, the issue was fully briefed to this Court. In its brief, petitioner described the operations of its run-of-river facility and concluded that "a discharge from a hydroelectric facility occurs when water is released or emitted that has been removed or blocked

[3] Petitioner's only cite to *PUD No. 1* is in a footnote and is to a portion of the dissent. Pet. 20 n.6.

from the flow of the stream." Brief for Petitioner, *PUD No. 1,* 1993 WL 632338 at *29.[4]

Similarly, the United States, having been invited by the Court to file an amicus brief, observed that "Congress employed the term 'discharge' when used without qualification (as in Section 401(a)) more broadly than the term 'discharge of any pollutant' which is used in a number of other provisions of the CWA," and concluded that a dam's release of water is a "discharge" that triggers § 401. Brief of the United States as Amicus Curiae Supporting Affirmance at 15 n.4. (1992 Lexis U.S. Briefs 1911.) Satisfied that Clean Water Act jurisdiction had been triggered, the *PUD No. 1* Court then proceeded to the merits.

Having ignored the *PUD No. 1* decision, Petitioner attempts to distinguish the decisions by the D.C. Circuit Court of Appeals since *PUD No. 1* that address what constitutes a discharge under Section 401, *North Carolina v. FERC,* 112 F.3d 1175 (D.C. Cir. 1997) and *Alabama Rivers Alliance v. FERC,* 325 F.3d 290 (D.C. Cir. 2003). Those decisions, though, are consistent with the acknowledgement in *PUD No. 1* that the discharge of water back

[4] Petitioner in *PUD No. 1* explained the basis for that conclusion in its brief as follows: "*The operation of a hydroelectric facility necessarily results in the discharge of water.* . . . In general, hydroelectric projects use the gravitational force of water as it moves down a stream from an upper to a lower elevation to drive a mechanical turbine that spins a generator, and thus produces electricity. The force of the falling water is exploited by a dam, or by a diversion structure like the Elkhorn Project's weir, that diverts water into a penstock, which then conveys the water down and into the turbine. *Water that has passed through the turbine is then returned to the stream somewhere below the powerhouse, through a conveyance known as a tailrace. Thus, hydroelectric facilities typically involve at least one discharge.* Brief for Petitioner, *PUD No. 1,* 1993 WL 632338 at *27-*28 (emphasis added).

into a river after it has been used to generate electricity triggers Section 401.

In *North Carolina,* the D.C. Circuit upheld FERC's ruling that an application to operate a pipeline that would withdraw water from the impounded portion of a river above a dam to use as drinking water would not result in "any discharge" and Section 401 certification was not required for the license amendment. *North Carolina,* 112 F.3d at 1187.[5] As support for its decision, FERC contrasted the proposed pipeline withdrawal with the discharge that is associated with the typical operations of a hydroelectric project:

> *The 'discharge' from the operation of the [hydroelectric] project is the water that leaves the project as it flows through a dam, or through penstocks, powerhouse turbines and tailraces, and reenters the river or some other waterway.*
>
> In a proceeding for a new license (relicense) of the project after the original license has expired, if no new facilities are proposed to be constructed, then the activity requiring certification is the continued operation of the project. *The place of discharge is the place at which project waters leave the project impoundment or bypass facilities and reenter the river or other waterway.*

[5] Initially, FERC ruled that Section 401 did not apply because FERC's regulations governing license amendments did not require Section 401 certification. *North Carolina,* 112 F.3d at 1172. The D.C. Circuit expressed "serious reservations" about FERC's attempt to redefine the statutory term "any discharge," but deferred addressing the issue because on appeal, FERC discarded the regulation as a basis for its decision. *Id.* at 1186.

Virginia Electric and Power Co., 77 F.E.R.C. ¶ 61,519 (emphasis added).[6]

The D.C. Circuit's subsequent decision in *Alabama Rivers* squarely addressed whether the flow of water through turbines constituted a discharge for purposes of Section 401. Specifically, the D.C. Circuit held that "an increase in the volume of water passing through the dam's replacement turbines may result in any discharge into the navigable waters within the meaning of [Section 401]." *Alabama Rivers,* 325 F.3d at 296-299.[7]

Collectively, the decisions in *PUD No. 1, North Carolina* and *Alabama Rivers* stand for the proposition that when a hydroelectric project removes water from a river, uses it to generate electricity and then returns that water to the river, there is a discharge for purposes of Section 401. In the case below, the Maine SJC concluded that "water that leaves the river and runs through the dam before returning to the river constitutes a discharge for the purposes of [Section 401]." Pet. App. 10. That conclusion is entirely consistent with the decisions in *PUD No. 1,*

[6] Underscoring this analysis by FERC is the fact that the very same licensee who in *North Carolina* vigorously opposed the applicability of Section 401 in the context of a license amendment to withdraw water did not contest Section 401's applicability a few years later when it sought to renew its license from FERC. Like the petitioner before this Court in *PUD No. 1,* the licensee, Dominion North Carolina Power, fully acquiesced that water flowing through its turbines and discharged downstream constituted a "discharge" triggering the Section 401 certification process. Int. App. 8-20.

[7] As did the court in *North Carolina,* the *Alabama Rivers* court expressed serious reservations about FERC's argument that "any discharge" and "discharge of any pollutant" are one and the same but did not address the issue because FERC failed to properly present it for review. *Alabama Rivers,* 325 F.3d at 298 n.11.

North Carolina and *Alabama Rivers*. Moreover, nothing in the SJC's decision applying Section 401 conflicts with the decisions applying Section 402 in *Consumers Power, Catskill Mountain* or *Dubois*. Accordingly, there is no conflict that merits granting certiorari.

iii. The Application of Section 401 Requires No Clarification From This Court.

Petitioner's claim that without this Court's clarification there will continue to be uncertainty as to what constitutes "any discharge" under Section 401 is as manufactured as the claim of conflict between the SJC's decision and decisions of this Court and other courts of appeals. Simply put, there is no uncertainty among the courts or the regulatory agencies as to the legal test to apply in determining whether a licensed activity "may result in any discharge."

Courts and regulatory agencies have all recognized that Section 401's use of the phrase "any discharge" is broader and more inclusive than Section 402's use of the phrase "discharge of any pollutant" such that "any discharge" includes, but is not limited to, the discharge of a pollutant. *See, e.g., Power Authority of New York v. Williams*, 101 A.D.2d 659, 660 (1989) ("This broad definition of the word 'discharge' and its application to 'any discharge' in [Section 401] requires that we reject petitioner's fundamental argument, i.e., that for section 401 to apply, a discharge must contain a specific and identifiable pollutant."); *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998) ("'Discharge' is the broader term because it includes all releases from point sources, whether polluting or nonpolluting."); *City of Augusta, Georgia*, 109 F.E.R.C. ¶ 62,210 ¶ 11 (2004) ("As defined in

the CWA, the term 'discharge' includes a 'discharge of a pollutant,' and thus the former term comprises a broader class of activities than the latter."); and Pet. App. 35, 41 (finding by Maine Board of Environmental Protection that, consistent with position of U.S. Environmental Protection Agency, "any discharge" as used in Section 401(a) is broader than "discharge of pollutants.")

Thus, in determining if an activity "may result in any discharge," courts and regulatory agencies uniformly agree that there must be some release, addition or flow from the licensed activity to the navigable water. *See, e.g., PUD No. 1*, 511 U.S. 700, 711 (no dispute among FERC, State of Washington, EPA and owner of hydroelectric project that release of water at end of tailrace constitutes discharge under Section 401); *In re Central Vermont Pub. Serv. Corp.*, 85 F.E.R.C. ¶ 61,410, 62,557 (1998) (a "discharge" from the operation of a hydroelectric project is the water that leaves the project as it flows over or through a dam, or through penstocks, powerhouse turbines and tailraces, and reenters the river or enters some other waterway); *City of Fort Smith*, 42 F.E.R.C. ¶ 61,362 at 62,047 (1988) (same). Accordingly, there is no legal issue this Court needs to clarify that merits granting certiorari.

2. The Second Question Presented By Petitioner Does Not Present A Conflict Or Controversy That Merits This Court's Review.

No dispute exists in this case or in the courts below concerning either FERC's exclusive licensing authority over hydroelectric projects, *California v. FERC*, 495 U.S. 490 (1990) or states' authority to certify with conditions that such projects meet applicable water quality standards. *See PUD No. 1*, 511 U.S. at 707-08. That question

was explicitly addressed and resolved by this Court's decision in *PUD No. 1.* In addition, there is no dispute or confusion as to the application of Section 401 to the licensing of hydroelectric projects, as set forth above. As such, there is no legal or factual dispute which merits certiorari as to the second question presented.

Substantively, Petitioner's argument ignores the system of cooperative federalism created by the CWA, and specifically Section 401, that gives states a clear and defined role in enforcing water quality standards within the state. 33 U.S.C. § 1341(d); 18 C.F.R. §§ 4.38(f)(7), 16.8. As this Court held in *PUD No. 1*, a state may place conditions on the activity as a whole that are necessary to meet state water quality standards. 511 U.S. at 712-719. In making this conclusion, this Court also ruled that Section 401 did not interfere with FERC's exclusive licensing authority. *Id.* at 721-22.

Because the SJC's decision is consistent with the language of the CWA and FERC's regulations and this Court's decision in *PUD No. 1*, it is difficult to discern what Petitioner is asking this Court to review. At best, Petitioner's argument is a fact-bound issue that does not warrant this Court's review. Certiorari should be denied as to Petitioner's second question presented.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

SEAN MAHONEY
(*Counsel of Record*)
VERRILL DANA, LLP
One Portland Square
Portland, ME 04112
(207) 774-4000

RONALD A. KREISMAN
25 Page Street
Hallowell, ME
(207) 626-0248

Counsel for Intervenors
American Rivers and Friends
of the Presumpscot River

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1105 September Term, 2004

S.D. Warren Co.,

Petitioner,

v.

Federal Energy Regulatory Commission,

Respondent.

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

Before: GINSBURG, SENTELLE and HENDERSON, *Circuit Judges*.

JUDGMENT

(Filed May 6, 2005)

This cause was heard on the record from the Federal Energy Regulatory Commission and on the briefs and arguments by counsel. For the reasons set out in the accompanying memorandum, it is

ORDERED that the petition for review is denied.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of

any timely petition for rehearing or rehearing en bane. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
/s/ Mark J. Langer
Mark J. Langer, Clerk

S.D. Warren Co. v. FERC, No. 04-1105

MEMORANDUM

The Federal Energy Regulatory Commission (FERC or Commission) issued a series of orders granting licenses to S.D. Warren Company (Warren) to operate and maintain five hydroelectric projects on the Presumpscot River in the State of Maine. *S.D. Warren Co.*, Project Nos. 2897-003, 2932-003, 2941-002, 2931-002 and 2942-005, 105 FERC ¶ 61, 013 (2003) (Multi-Project Order); *S.D. Warren Co.*, Project No. 2931-002, 105 FERC ¶ 61,010 (2003); *S.D. Warren Co.*, Project No. 2932-003, 105 FERC ¶ 61,011 (2003); S.D. *Warren Co.*, Project No. 2941-002, 105 FERC ¶ 61,012 (2003); and, *S.D. Warren Co.*, Project No. 2942-005, 105 FERC ¶ 61,009 (2003). Pursuant to the terms of the Federal Power Act (FPA), 16 U.S.C. §§ 792 *et seq.*, the FERC attached conditions to the licenses to protect environmental and recreational interests affected by Warren's hydroelectric projects. The conditions included fishway prescriptions filed by the Department of Interior (Interior) under § 18 of the FPA, *id.* at § 811, that required Warren to install eel ladders at each project dam to facilitate upstream migration by American eel and mandated an eight-hour shutdown of the project turbines for an eight-week period in the fall of each year to protect downstream eel migration. Multi-Project Order, 105 FERC at 61,138,

¶¶ 42-43. Interior also placed conditional obligations on Warren to provide upstream and downstream fish passage facilities at each project dam as fish passage is achieved at the next most downstream dam. *Id.* at 61,137-38, ¶¶ 35-41. Specifically, if fish passage is achieved at a downstream dam not controlled by Warren over which the FERC lacks jurisdiction, within two years Warren is required, *inter alia*, to construct denil fish ladders at its most downstream dam. *Id.* at 61,137, ¶ 36. Construction of fish passage facilities at each of Warren's upstream dams is conditioned on the attainment of specific fish population triggers at the next downstream dam. *Id.* The FERC also attached conditions imposed by the State of Maine pursuant to the state water quality certification (WQC) process under § 401 of the Clean Water Act, 33 U.S.C. § 1341(d). Maine's WQC conditions imposed, *inter alia,* dissolved oxygen standards and minimum bypass flows (intended to mitigate the dewatering of the Presumpscot River spillways below each project) and required Warren to develop a recreational facility enhancement plan for each project. *See* Multi-Project Order, 105 FERC at 61,136, ¶ 25. In addition, pursuant to § 10(a) of the FPA, 16 U.S.C. § 803(a), the Commission imposed conditions designed to ensure that the projects would "be best adapted to a comprehensive plan for ... the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including ... recreation[]." *Id.* at § 803(a)(1). Based on the Final Environmental Impact Statement (FEIS) issued by the Commission staff on June 26, 2002, the FERC required Warren, *inter alia,* to develop a Shoreline Management Plan (SMP) for its two largest projects with a shoreline buffer zone of 200 feet. Multi-Project Order, 105 FERC at 61,141-42, ¶¶ 64-66. The

FERC also required Warren to monitor and report on recreational use near the project sites every 12 years. *Id.* at 61,149-50, Article 409. The FERC issued the licenses *for* a 40-year term. *Id.* at 61,144, ¶ 86.

Warren petitioned the Commission for rehearing: On rehearing, the FERC upheld the orders with respect to the license requirements which it had included and denied rehearing as to the § 18 and § 401 conditions, concluding that it had no authority to revise or remove those provisions from the licenses. *S.D. Warren Co.*, Project Nos. 2897-005, 2931-004, 2932-006, 2941-004, and 2942-007, 106 FERC ¶ 61,087, 61,293-94, ¶¶ 3, 4, 7, 11-14, 16 & nn. 7-8, 13 (issued January 29, 2004) (Rehearing Order). *See Bangor Hydro-Elec. Co. v.* FERC, 78 F.3d 659, 663 (D.C. Cir. 1996) ("[I]t is not the Commission's role to judge the validity of Interior's position – substantially or procedurally."); 33 U.S.C. § 1341(d) ("Any certification provided under [§ 401] . . . shall become a condition on any Federal license or permit subject to the provisions of this section."). *See also Alabama Rivers Alliance v. FERC,* 325 F.3d 290, 292-93 (D.C. Cir. 2003) (same).

Warren challenges the sufficiency of the evidence in the record to support the Commission's § 10 conditions and Interior's § 18 prescriptions. Warren also challenges the 40-year license term as arbitrary and capricious. We uphold the Commission's orders because they are supported by substantial evidence in the record, 16 U.S.C. § 8251(b), and because the Commission "examined the relevant data and provided a reasoned explanation supported by a stated connection between the facts found and the choice made." *North Carolina v. FERC,* 112 F.3d 1175, 1189 (D.C. Cir. 1997) (internal quotation marks omitted). The conditions imposed by the Commission under § 10 are

supported by substantial evidence. The FEIS upon which the Commission relied considered the comments of several entities, including the FWS and National Park Service, as well as the Maine Department of Marine Resources, the Maine Atlantic Salmon Commission, the Maine Department of Inland Fisheries and Wildlife and three individuals. *See* Multi-Project Order at 61,135, ¶ 18 & n.5. The Commission altered the scope of the conditions recommended by the FWS, reducing the 500-foot buffer zone for the SMPs to 200 feet and decreasing the reporting requirement for recreational use studies from every six years to every 12 years, because the FWS had failed to provide sufficient evidence to support its more stringent recommendations. *Id.* at 61,141-42, ¶¶ 64-66.

With respect to Warren's challenge to Interior's fishway prescriptions under § 18, we apply the same arbitrary and capricious standard that governs the actions of the Commission. *Wisconsin Power & Light Co. v. FERC,* 363 F.3d 453, 461 (D.C. Cir. 2004). Interior's fishway prescriptions must be "reasonably related" to its goal of fish preservation. *Bangor Hydro-Electric*, 78 F.3d at 663. The scientific evidence in the record demonstrates significant populations of American eel and a 2000 study of the Presumpscot projects commissioned by Warren documents the extent to which the project dams impaired the ability of the eels to migrate upstream due to difficulty ascending dam faces. Studies of similar projects demonstrated the hazards of downstream migration, specifically, high mortality rates caused by project turbines. Interior's prescriptions are reasonably calculated to mitigate these harms. The required eel passageways provide for efficient upstream migration at a "relatively low cost," according to the FEIS. Interior's requirement that Warren shut down

turbine operation for a period of eight hours per day for eight weeks during peak migration is likewise a reasonable prescription. Interior reasonably concluded that current scientific evidence does not permit a reliable estimate of a shorter peak migratory period that would ensure similar protection of the eel with a less stringent shutdown requirement. Interior has directed Warren to conduct a three year study of migratory patterns, the results of which may enable Interior to reduce the 8/8 requirement without proportionally increasing the risk to migrating eels. Likewise, Interior's prescriptions with respect to anadromous fish species are reasonable. The fish passageway requirements are conditioned on restoration of the relevant species to the areas below each project. In the absence of species restoration, Warren need not undertake any construction based on the prescription. The target levels for fish population that trigger action, roughly 20 per cent of the maximum estimated population size, are reasonably calculated to ensure that Warren need not undertake construction at its upstream projects unnecessarily.

The conditions imposed by the FERC require Warren to undertake a "moderate amount of construction and environmental mitigation and enhancement measures." *See* Multi-Project Order at 61,144, ¶ 86. The record evidence supports the Commission's assessment. More extensive construction that might be required under Interior's conditional fishway prescriptions could, if actually imposed, provide a basis for extending the license term. Until that time, the 40-year license term, instead of the 50-year license Warren had sought for "extensive" construction, cannot be considered arbitrary or capricious.

M.G. Deacon, Jr.
Vice President
[Illegible] & Hydro

Dominion Generation
Innsbrook Technical Center
5000 Dominion Boulevard, Glen Allen, VA 23060

[LOGO]

August 26, 2003

Ms. Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

FERC PROJECT NO. 2009
ROANOKE RAPIDS AND GASTON
HYDROPOWER PROJECT
NORTH CAROLINA CWA
SECTION 401 CERTIFICATION

(Filed Aug. 27, 2003)

Dear Ms. Salas:

Virginia Electric and Power Company, doing business as Dominion Virginia Power (Dominion) is working with FERC staff to complete the record for the license renewal for Roanoke Rapids and Gaston, project no. 2009. Attached you will find the State of North Carolina's CWA Section 401 Certification for the project.

If you have any questions related to this submittal, please call Jim Thornton (804) 273-3257.

Sincerely,

/s/ M G D J
M. G. Deacon, Jr.

Attachment

cc: Mr. Allan Creamer, FERC, Washington, DC

[LOGO] [Names Omitted In Printing]

July 30, 2003

(Filed Aug. 27, 2003)

Mr. Malcolm G. Deacon, Jr. Vice President –
Fossil and Hydro
Dominion Energy and Dominion Generation
Innsbrook Technical Center
5000 Dominion Blvd.
Glen Allen, VA 23060

Dear Mr. Deacon:

Re: Certification Pursuant to Section 401 of the Federal Clean Water Act for the Roanoke Rapids and Lake Gaston FERC Relicensing Project
WQC Project #02-0919
FERC Number 2009
Halifax County and adjacent counties

Attached hereto is a copy of Certification No. 3208 Issued to Dominion North Carolina Power dated July 30, 2003. If we can be of further assistance, do not hesitate to contact us.

Sincerely,

/s/
Alan W. Klimek, P.E. Director

Attachments

cc: Raleigh and Washington DWQ Regional Offices
Doug Huggett, Division of Coastal Management
File Copy
Central Files
Darlene Kucken; DWQ Basinwide Planning Program Unit
Jim Mead, NC Division of Water Resources

Marc Bernstein, NC Attorney General's Office
Robin Smith, DENR
Thomas Leahy, Ill P.E., City of Virginia Beach, VA
Jean McCarter, Lake Gaston Association
Bob Lindsay, Roanoke River Basin Association
Garland Pardue, US Fish and Wildlife Service – Raleigh
David Rackley, National Marine Fisheries Service, Charleston, SC
Shannon Denton, NC Wildlife Resources Commission
Ron McKittrick, Federal Energy Regulator Commission
Sara Winslow, NC Division of Marine Fisheries
Bud Laroche, Virginia Department of Game and Inland Fisheries
Rheta Geddings, SC Department of Health and Environmental Control
Ellen Gifinsky, VA Water Control Board, Wetlands Program
Joseph Hassell, VA Department of Environmental Quality

NORTH CAROLINA 401 WATER QUALITY CERTIFICATION

THIS CERTIFICATION is issued in conformity with the requirements of Section 401 Public Laws 92-500 and 95-217 of the United States and subject to the North Carolina Division of Water Quality ('DWQ') Regulations in 15 NCAC 2H, Section .0500. It is issued to Dominion North Carolina Power ("the applicant") in Halifax County and adjacent counties pursuant to a revised application filed on the 20th day of November, 2002 to, among other things, retain the Gaston and Roanoke Rapids dams across the Roanoke River.

The application provides adequate assurance that the retention of fill material into the waters of the Roanoke River in conjunction with retention and operation of these dams and other project activities will not result in a violation of applicable Water Quality Standards, discharge guidelines and other applicable State laws. Therefore, the State of North Carolina certifies that this activity will not violate the applicable portions of Sections 301, 302, 303, 306, 307 of PL 92-500 and PL 95-217 if conducted in accordance with the application and conditions hereinafter set forth.

This approval is only valid for the purpose and design that you submitted in your application, as described in the revised application. If you change your project, you must notify us and may be required to send us a new application for a new Certification. If the property is sold, the new owner must be given a copy of the Certification and approval letter and is thereby responsible for complying with all conditions. For this approval to be valid, you must follow the conditions listed below. The issuance of this Certification shall not exempt the applicant from complying with any and all statutes, rules, regulations, or ordinances that may be imposed by other government agencies (local, state and federal) which have jurisdiction, including but not limited to applicable river buffer rules in 15A NCAC 2B .0200, erosion and sedimentation control requirements in 15A NCAC Chapter 4 and under the Division's General Permit NCG010000, and any requirements pertaining to wetlands under 15A NCAC 2B .0200, 15A NCAC 2H .0500 and 15A NCAC 2H .1300. This Certification is issued on the express representation by the applicant that the Settlement Agreement referenced herein has been executed by all necessary signatories and therefore is

in effect. If the Settlement Agreement is not in effect as of July 30, 2003 then this Certification may be modified by DWQ in order to coincide with the relevant provisions of that Settlement Agreement.

Condition(s) of Certification:

1 Flow In the Bypass Reach –

1.1 Flow of water in the bypass reach shall not be less than 325 cfs at any time except as modified by future adaptive management studies as approved in writing by DWQ. The adaptive management studies shall focus on the spawning window (at least March 15 through June 15). However, slight reduction in flows in the winter months may be approved, but shall not result in minimum flows less than 300 cfs. The flow shall be released from both the north and south ends of the dam so that it is evenly distributed into the reach. The precise schedule for release may be developed in consultation with the Cooperative Management Team ("CMT") consisting of representatives of the NC Department of Environment and Natural Resources ("DENR"), NC Wildlife Resources Commission ("WRC"), US Fish and Wildlife Service ("USFWS"), National Marine Fisheries Service ("NMFS") and the applicant.

1.2 The applicant shall provide on a periodic basis for the duration of 24 consecutive hours, flow to the bypass reach of 500 cfs ("freshet flow") on a schedule provided by DWQ in consultation with WRC. The scheduling of the 500-cfs flow may be on weekends in order to minimize the cost of hydropower losses.

1.3 The applicant shall follow an annual schedule provided by DWQ upon consultation with WRC to the applicant by November 30 for the following year. The annual scheduling of the 500-cfs may not exceed a total of 17 days of the freshet flows. After the annual schedule has been provided to the applicant, DWQ may modify the schedule in consultation with WRC but shall give the applicant a minimum of 10 days notice prior to modification of the 500-cfs scheduling. Whenever flood flows require opening of the Roanoke Rapids darn floodgates for at least one 24-hour period and up to 21 days, this will count as one of the 500-cfs flow days. (A 22 to 42-day flood release would count as two freshet flow days, etc.) If, during a study cycle, the flow for a period of 21 days equals or exceeds 500 cfs, the number of freshet flows required for that year will be reduced by one. The applicant shall provide to DENR and WRC by March 31 of the following year, a report that lists the days that the 500 cfs freshest flow was passed into the bypass reach. Consistent with article FL1, section 4 of the Settlement Agreement, during cycles two, three and four of the bypass reach study, the annual scheduling of the 500-cfs may not exceed a total of 13 days of the freshet flows.

1.4 The applicant shall reduce flood flow releases at the Roanoke Rapids dam from 35,000 cfs (or any flow greater than 5,000 cfs through the floodgates) to 25,000 cfs in consultation with the US Army Corps of Engineers ("USACE"). Once the flood releases through the Roanoke Rapids floodgates are reduced to 5,000 cfs, the applicant shall reduce the flows in the bypass reach per the rates in Table 1 below:

Table 1	
Hour	Release (cfs)
0	5,000
4	4,000
8	3,000
12	2,000
16	1,500
20	1,000
24	700
28	500
32	325

If flood releases occur but do not reach 5,000 cfs through the floodgates, the table above shall still be used starting at the maximum flood release. The bypass reach flow may be temporarily modified if required by unusual circumstances upon written agreement between the DWQ and the USACE and in consultation with the Licensee and the WRC. Temporary changes will be coordinated with the other agendas of the CMT in a timely manner.

1.5 If DWQ, in consultation with the CMT, delays Implementation of this condition to allow for the collection of baseline data, Implementation shall begin as determined by DWQ. If the implementation of this condition is not so delayed, then the applicant shall begin releasing water into the bypass reach within one week of acceptance of the new license for Federal Energy Regulatory Commission Project No. 2009 ("new FERC license").

1.6 The applicant, in consultation with the CMT, shall conduct the study described in article FL1, section 4 of the Technical Settlement (Appendix B) of the Settlement Agreement. Consistent with such article, the applicant shall not

adopt a new flow regime for the bypass reach without written approval from DWQ.

2 **Minimum Releases from the Roanoke Rapids dam** – The following schedule shall be followed for the minimum release of water from the dam. "Declaration" refers to the daily mean of the USACE weekly declaration. The applicant shall implement this new flow regime within 30 days of acceptance of the new FERC license.

2.1 – Minimum and Target Flow Releases from Roanoke Rapids Dam		
Timeframe	**Condition**	**Minimum Flow**
Jan. 1-15	Declaration < 6000 cfs	2000 cfs
	Declaration ≤ 6000 cfs	2500 cfs
Jan. 15-Feb. 28/29	Declaration < 6000 cfs	2500 cfs or declaration, whichever is less
	Declaration ≥ 6000 cfs	3000 cfs
March	Declaration ≤ 3500 cfs	minimum flow = Declaration
	Declaration > 3500 cfs	minimum flow = 3500 for peaking days
		5 peaking days during month
		3 peaking day limit per week
		3 consecutive peaking day limit
		Can only peak in two of the weeks
	Ramp up	Ramp up from min. by 5000 cfs hold for 1 hour, then go to full load

	Ramp down	Ramp down to min. flow + 5000 cfs, hold for one hour then go to minimum flow.
April 1-June 15	All conditions	Flow = mean of weekly declaration, no peaking
	Ramp	Change from one to next weekly declaration cannot exceed 5000 cfs per hour
June 16-June 30	All conditions	2800 cfs or declaration, whichever is less
July 1-September 15	All conditions	2000 cfs
Sept. 16-Nov. 15	All conditions	1500 cfs
Nov. 16-Nov. 30	All conditions	2000 cfs
Dec. 1-Dec. 31	Declaration < 6000 cfs	2000 cfs
	Declaration ≥ 6000 cfs	2500 cfs

2.2 When the USACE declares a drought, the applicant shall maintain the following drought minimum flows unless otherwise directed by the USACE in consultation with DWQ and WRC:

Table 2

January – August	2000 cfs
September – November	1500 cfs
December	2000 cfs

2.3 Transition from Flood Control to Normal Hydropower Operations –

The applicant shall work in conjunction with the USACE to gradually reduce flows in the bypass reach per the schedule described in Condition 1 of this Certification. Following USACE

flood control releases from the Roanoke Rapids dam, the applicant shall work in conjunction with the USACE to reduce flows in the mainstream river gradually during the months of May through September to minimize the effects of inflow of water with low oxygen levels into Roanoke River from downstream wetlands. Upon agreement with the USACE and in consultation with DWQ, the applicant shall implement the following step-down schedule from a 20,000-cfs flow:

Table 3

Hour	Flow (cfs)
0	17,000
8	14,000
16	12,000
20	11,000
24	10,500
28	10,000
32	9,500
36	9,000

This schedule may be revised upon written request to DWQ if the ongoing USACE section 216 study indicates a different step-down schedule should be followed.

Table 3, above, represents a maximum flow reduction schedule. A slower step-down schedule (one that reaches the 9000 cfs flow over a longer period of time) may be approved by the USACE in consultation with DWQ and the applicant on a case by case basis. During the time-frame needed to execute the flow reduction schedule, the applicant would not engage in load-following operations. The applicant shall implement the step-down flow schedule beginning

when the applicant has accepted the new FERC license.

3 Downstream Water Quality –

3.1 Minimum Flow – Minimum flows to address downstream uses are discussed in Condition 2 of this Certification.

3.2 *Erosion and Sedimentation* – The applicant shall develop a plan to monitor the effect of within-day peaking on benthic macroinvertebrates, fish communities and stream bank erosion along the Roanoke River downstream of the Roanoke Rapids dam. The development of that plan shall be in cooperation with a CMT consisting of WRC, DENR, USFWS, NMFS, the Nature Conservancy ("TNC"), and the applicant, with the Regional Partnership of Local Governments ("RPLG") as an ex officio member. Monitoring cycles shall consist of five-year periods beginning when the applicant accepts a new FERC license. The applicant shall be required to fund the cost of Implementing the monitoring plan up to the amount of $30,000 annually (2002 dollars adjusted according to the Consumer Price Index). Any portion of the $30,000 not utilized shall be carried forward to the Licensee's future annual budget cycles and shall be in addition to the $30,000 allocated for that cycle. In the thirtieth year of the license, the Licensee shalt consult with the GMT to determine if an increase in funding of the monitoring program is appropriate. Within one year of the acceptance of the new FERC license, the applicant shall transmit the plan to DWQ for written approval and subsequent implementation by the applicant. If DWQ does not provide written comments to the applicant within 60 days of

receipt of this plan, then the plan may be Implemented as submitted. During the first monitoring cycle, data collection shall not be required to start until year two to allow for development of the monitoring plan and protocols.

DWQ, in consultation with the CMT, will review monitoring data at the end of each cycle to determine if it establishes a link between the applicant's within-day peaking and (a) erosion of the banks of the Roanoke River downstream of the Roanoke Rapids dam and/or (b) negative effects on downstream benthic macroinvertebrate or fish species and communities. If such a link is established, then DWQ – in consultation with the CMT – will develop an approach that requires the applicant to address those effects by modifying one of the following: maximum peaking flow; difference between base flow and peak flow on peaking days; ramping rates; duration of base flow (in hours) between peaking releases; modification of the definition of a peaking period in condition 8 of this Certification; or some other modification that the CMT suggests might reduce adverse impacts of within-day peaking on aquatic biota and/or stream bank stability. Seasonal variations may also be incorporated in this approach. Upon written notice of the development and written approval from DWQ for this approach, the applicant shall Implement this approach.

If subsequent monitoring indicates a continuing link between within-day peaking operations and bank erosion and/or negative effects on downstream aquatic species and immunities, then DWG – in consultation with the CMT – will develop an additional Incremental modification from the [sic] those listed in the paragraph

above that the applicant must implement to further reduce those effects. Upon written notification of any additional incremental modification, and so long as such modifications reduce the latitude available to the applicant for within-day peaking by a proportional amount equivalent to 5 divided by the period of the new FERC license in years, the applicant shall implement such modification. The exact means for calculating the proportionality of steps will be determined by DWQ in consultation with the CMT. If any operational changes subject to this section (3.2) would conflict with release requirements subject to sections 2, 3.4 or 3.5 of this Certification, then the flow-related conditions of these other sections shall take precedence.

3.3 *Minimum Oxygen Releases from the Roanoke Rapids Dam* – Water flowing through the hydropower turbines from the Roanoke Rapids dam shall meet or exceed the Instantaneous dissolved oxygen standard in effect as of the date of the discharge. The Instantaneous dissolved oxygen standard as of the date of this Certification is 4.0 mg/L (ppm) (15A NCAC 2B .0211(3)(b)).

Water flowing through the hydropower turbines from the Roanoke Rapids dam shall meet or exceed the mean, daily dissolved oxygen standard in effect as of the date of the discharge. The mean, daily dissolved oxygen standard as of the data of this Certification is 5.0 mg/L (ppm) (15A NCAC 2B .0211(3)(b)). The daily mean oxygen concentration shall be calculated as the mean of all instantaneous analyses collected in a 24-hour period to be no less than 24, hourly measurements. If dissolved oxygen concentrations

immediately upstream of the project do not meet or exceed the instantaneous dissolved oxygen standard and mean, daily dissolved oxygen standards in effect as of the date of the discharge, then the Raleigh Regional Office of DWQ shall be notified in writing and via telephone. In any case, the dissolved oxygen in the water flowing through the hydropower turbines from the Roanoke Rapids dam shall equal or exceed the upstream dissolved oxygen concentration.

Oxygen concentrations shall. be measured in the tailrace.

Within six months of the applicant's acceptance of a new FERC License, the applicant shall submit a draft agreement to DWQ regarding the location of the sampling point upstream of the project if the dissolved oxygen water quality standard is not met in the tailwaters below Roanoke Rapids dam, then the applicant shall begin sampling for dissolved oxygen levels within two business days in Lake Gaston and in the tailwaters below Lake Gaston.

Data from the Roanoke Rapids monitoring shall be maintained on a real-time basis via Internet and forwarded to the Wetland/401 Unit, the Ecosystems Unit and the Raleigh and Washington Regional Offices of DWQ every other month from November 1 through May 31 and monthly from June 1 through October 31. Data must be submitted electronically and DWQ shall be notified in writing that the data have been sent. Data must include Flow (cfs), Dissolved Oxygen concentrations (mg/L) and Water Temperature (°C).

In the event of temporary emergency conditions arising in the performance of the above conditions, the applicant shall cooperate in good faith with DWQ and WRC to take such reasonable steps to protect the water quality of the Roanoke River below the Gaston and Roanoke Rapids dams.

3.4 *Flow Augmentation from Lake Gaston Storage during Drought Conditions* – Conditions requiring flow augmentation from Gaston storage:

If all four of the following conditions are met, the applicant shall begin augmenting downstream flows from the Lake Gaston storage in consultation with DWQ and WRC.

a) USACE is operating Kerr reservoir under its drought management strategy,

b) Roanoke Rapids dam is not in a hydropower peaking mode and is only releasing drought minimum flows as directed by the USACE drought management strategy or when condition 2.2 is in effect,

c) A weekly declaration from USACE is issued that is less than the total of drought minimum flow required at the Roanoke Rapids dam, and

d) Lake Gaston water level is above 197' msl.

Lake Gaston storage – Lake Gaston normal water level shall be regulated by the applicant: in order to maintain the existing uses of the lake with the following provisions. if all of the drought storage is used for downstream flow augmentation, then the applicant shall regulate Lake Gaston from 197.5' msl to 196.5' msl, in

order to meet system operational needs with the following provisions:

a) For the purpose of flow augmentation downstream under the conditions listed above, Lake Gaston has 3 feet of drought storage.

b) Lake Gaston has approximately 60,000 acre-feet of storage between 200' msl and 197' msl.

c) The applicant utilizes one foot of storage for normal operation between 200' msl and 199' msl.

Once above conditions are met, Lake Gaston storage shall be used to augment the downstream flow to adhere to the FERC minimum flow, per direction of DWQ.

Once Lake Gaston reaches 197' msl, flow augmentation shall cease and flow entering the project from Kerr Lake shall equal the flow leaving the Roanoke Rapids dam, after accounting for consumptive withdrawals, evaporation and inflows to Lake Gaston and Roanoke Rapids Lake.

When the USACE weekly declaration begins to exceed the Roanoke Rapids dam drought minimum flows, the applicant shall allow Lake Gaston to refill to 199.5' msl prior to:

a) exceeding drought minimum flow at the Roanoke Rapids dam and,

b) starting to operate the Roanoke Rapids project in a hydropower peaking mode.

The applicant shall implement these conditions only upon consultation with and direction from the USACE and DWQ.

3.5 *Downstream Water Quality Monitoring* –

The applicant shalt fund three of the current USGS continuous water quality monitoring stations for dissolved oxygen and temperature at Halifax, Oak City and Jamesville. These stations shall be operated continuously throughout the year.

The applicant shall provide funding annually by March 1st of each year to DENR.

The stations shall be monitored to document that dissolved oxygen levels in the Roanoke River, as a result of the drainage of water from the floodplain resulting from project operations, equals or exceeds the instantaneous dissolved oxygen standard and mean, daily dissolved oxygen standards in effect as of the date of the discharge in the mainstem river (15A NCAC 2B .0211(3)(b)). This concentration shall be calculated using all available daily data or as (at least) the mean of 24, hourly instantaneous analyses.

At such time DWQ establishes that the applicant's operations do not or no longer affect downstream water quality, applicant funding shall no longer be required.

If funding is discontinued in accordance with this Condition and subsequent applicant operational changes enable DWQ to demonstrate that water quality monitoring is again necessary, the applicant's funding requirement shall

be reinstated. The study period shall be mutually agreed upon by the applicant, DWQ and WRC.

Data shall be forwarded to the Wetland/401 Unit, the Ecosystems Unit and the Raleigh and Washington Regional Offices of DWQ every other month (bi-monthly) from November 1 through May 31 and monthly from June 1 through October 31. Data must be submitted electronically. Data must include all available parameters collected by the USGS (e.g. stage or flow) in addition to: site, date, time, depth, dissolved oxygen concentrations (mg/L.), and water temperature (oC). In the event of emergency water quality conditions, the applicant shall cooperate in good faith with DWQ and WRC to take such reasonable steps to protect the water quality of the Roanoke River below the Roanoke Rapids dam.

The applicant, DWQ and WRC shall mutually agree upon a method of evaluating data collected within the first year of monitoring. Data evaluation shall occur on a five-year cycle.

If during water quality data evaluation, DWQ (in consultation with WRC) finds that scientific data establish a causal link between the applicants rescheduling of the USACE's weekly declaration and the reduction of water quality in the mainstem river below State standards, the applicant with concurrence of DWQ and WRC shall identify and implement operational changes that will significantly reduce the applicant's water quality impacts.

Each operational change implemented according to the preceding paragraph must reduce the

applicant's rescheduling of the USACE weekly declaration by a proportional amount equivalent to 5 divided by the period of the new FERC license in years. Thus, if as the result of monitoring, the applicant implements a change to reduce its rescheduling of the USACE weekly declaration at the end of each monitoring cycle, by the end of the last monitoring cycle, each day the applicant shall release one seventh of the USACE weekly declaration. The exact means for calculating the proportionality of steps will be determined by DWQ in consultation with WRC and the applicant.

The applicant's flexibility for scheduling releases during a peaking day is not constrained by this condition.

The applicant is not required by this Certification to make modifications to the USACE weekly declaration.

The maximum operational duty of the applicant under this Condition is reached when the daily water flow through the Roanoke Rapids dam equals one-seventh of the USACE weekly declaration as long as this flow does not conflict with the requirements of condition 3.4 above.

4 Reporting of Consumptive Uses –

The applicant shall identify and report in writing existing and proposed consumptive uses to DWQ and the NC Division of Water Resources ("DWR"). The applicant shall report the existing or projected (as appropriate) average consumptive withdrawal and maximum capacity for each withdrawal. The applicant shall report existing consumptive uses to DWQ and DWR within 60 days of the acceptance of the new

FERC license and shall report proposed new or expanded consumptive uses to DWQ and DWR within 30 days of receiving a request for the proposed new or expanded withdrawal and before submitting any requests to FERC. Conditions 4 through 7 of this Certification apply to large consumptive uses, but not exclusively.

5 Conservation and Drought Management –

In anticipation of low flow conditions, such as occur during critical droughts, the applicant shall take actions as described in this Certification to ensure that sufficient water of adequate quality is and will be available to assure compliance with State water quality standards and other appropriate requirements of State law. In furtherance of the purposes of this condition, article FL6, section 3 of the Technical Settlement (Appendix B) of the Settlement Agreement ("FL6 § 3"), is made part of this Certification as if set forth fully herein. Any amendment to FL6 § 3 shall not become a part of this Certification except through the procedures set forth in condition 7. The applicant shall take all actions specifically required of the applicant by FL6 § 3 and shall take all other necessary actions within its authority to implement FL6 § 3.

6 No Rights Granted –

This Certification does not grant or affirm any property right, license or privilege in any waters or any right of use in any waters. This Certification does not authorize any person to interfere with the riparian rights, littoral rights or water use rights of any other person, and this Certification does not create any prescriptive right or

any right of priority regarding any usage of water. No person shalt interpose this Certification as a defense in any action respecting the determination of riparian or littoral rights or other water use rights. No consumptive user is deemed by virtue of this Certification to possess any prescriptive or other right of priority with respect to any other consumptive user regardless of the quantity of the withdrawal or the date on which the withdrawal was initiated or expanded. This Certification issues on the express understanding of DENR that, pursuant to Federal Power Act section 27, 16 U.S.C. § 821, the new FERC license does not establish or determine a proprietary right to any use of water. It establishes the nature of the use to which a proprietary right may be put under the Federal Power Act.

7 Continuing Compliance –

The applicant shall conduct its activities in a manner consistent with State water quality standards (including any requirements resulting from compliance with section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d)) and any other appropriate requirements of State law and federal law. If DWQ determines that such standards or laws are not being met (including the failure to sustain a designated or achieved use or to comply with any new or amended water quality standards or other appropriate requirements of State or federal law) or that State or federal law is being violated, or that further conditions are necessary to assure compliance, DWQ may reevaluate and modify this Certification to include conditions appropriate to assure compliance with such standards and requirements in accordance with 15A NCAC

2H.0507(d). Before modifying the Certification, DWQ will notify the applicant and FERC, provide public notice in accordance with 15A NCAC 2H.0503 and provide opportunity for public hearing in accordance with 15A NCAC 2H.0504. Any new or revised conditions will be provided to the applicant in writing, will be provided to the USACE for reference in any permit issued pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344, for the project, and shall also become conditions of the new FERC license for the project. This condition shall constitute "reserved authority" as that term is used in Section 9.2 of the Settlement Agreement. The conditions of this Certification are not modified or superseded by any condition or article of the new FERC license.

8 Definitions/Glossary of Terms –

The listed terms are definitions utilized throughout this Certification unless otherwise specified in specific conditions of the Certification.

cfs – (Cubic feet per second) – Volume of one cubic foot of water passing a given point in one second.

Day – The 24 hour period from midnight to midnight.

Diadromous Fish – Fish that live as adults in a salt water system and spawn in a fresh water system (anadromous) or fish that live as adults in fresh water and spawn in salt water (catadromous).

Drought Declaration – For the purpose of this settlement agreement, a declared drought

is whenever the USACE activates the Drought Advisory Committee.

Electrical Demand Emergency – A condition of the applicant's power grid that potentially would lead to reduction in voltage (brownouts) or removing alternating customers from electrical service (rolling black-outs) because demand exceeds production within the applicants service area.

Flood Control – The controlled release of water from the USACE Kerr dam when the level in Kerr Reservoir is in or above Zone E of the guide curve.

Instantaneous Flow – The flow in cfs passing a point at a particular instant.

Kerr Dam (Buggs Island Dam) – The dam on the Roanoke River immediately upstream of the Gaston dam, forms Kerr Lake federally owned and operated by the USACE.

mg/L (milligrams per liter) – An expression of chemical concentration of matter (solid, liquid or gas) dissolved in a liquid (usually water).

Minimum Flow and Target Flow – Unless otherwise stated, minimum flow and target flow shall refer to the sum of the instantaneous releases made by the applicant from Roanoke Rapids dam.

MWH (megawatt hour) – A unit of measure for the production of electricity equal to 1 million watts for one hour.

Peaking Day – Any day when the amount of water released by the applicant from the Roanoke Rapids dam exceeds the daily mean of the

USACE weekly declaration by 1000 cfs averaged over the day.

Peaking Period – Any two-hour period when the mean rate of release in cfs exceeds the hourly mean of the daily release by 2500 cfs or more, or as modified as per section 3.2.

ppm (parts per million) – An expression of chemical concentration of matter (solid, liquid or gas) dissolved in a liquid (usually water). One ppm = one mg/L.

Settlement Agreement – The "Comprehensive Relicensing Settlement Agreement for the Roanoke Rapids and Gaston Dam Project, FERC Project No. P-2009," effective July 2003.

USACE Weekly declaration – The total amount of water the USACE allocates for release in one week, plus additional water (energy) utilized by the applicant or Progress Energy from their storage accounts, including adjustments the USACE may make during the week. The declaration may be referred to in either power (MWH) or flow (cfs) units. When compared to or used to define minimum flow or target flow, the weekly declaration shall be net of evaporation, consumptive uses and local inflows into Lake Gaston and Roanoke Rapids Lake, except that water withdrawals shall not be considered consumptive uses to the extent they are supported by the release of water from dedicated storage in Kerr Reservoir.

Week – The period of 7 days covered by the weekly declaration of the Corps, currently, Saturday 0000 hours through Friday 2400 hours.

Weekly Declaration Flood (WDFlood) – any flood plain inundation that results (or would

result) from a USACE weekly declaration of flood control releases whether or not the applicant releases peaking flows during the week.

Within-day Peaking – Any day with one or more peaking periods.

Within-week Peaking – Any week with one or more peaking days.

Violations of any condition herein set forth may result in revocation of this Certification and may result in criminal and/or civil penalties or other enforcement action. This Certification shall become null and void unless the above conditions are made conditions of the FERC Permit This Certification shall expire upon expiration of the FERC permit.

If this Certification is unacceptable to you, you have the right to an adjudicatory hearing upon written request within sixty (60) days following receipt of this Certification. This request must be in the form of a written petition conforming to Chapter 150B of the North Carolina General Statutes and filed with the Office of Administrative Hearings, P.O. Box 27447, Raleigh, N.C. 27611-7447. If modifications are made to an original Certification, you have the right to an adjudicatory hearing on the modifications upon written request within sixty (60) days following receipt of the Certification. Unless such demands are made, this Certification shall be final and binding.

This the 30th day of July 2003
DIVISION OF WATER QUALITY

/s/ [illegible]
Alan Klimek, P.E., Director

Certification Number 3208

Certificate of Completion

DWQ Project No.: 02-0919 County: Halifax and other adjacent counties

Applicant: Dominion North Carolina Power

Project Name: Roanoke Rapids and Lake Gaston FERC Project

Date of issuance of 401 Water Quality Certification: July 30, 2003

Upon completion of all work approved within the 401 Water Quality Certification or applicable Buffer Rules, and any subsequent modifications, the applicant is required to return this certificate to the 401/Wetlands Unit, North Carolina Division of Water Quality, 1621 Mail Service Center, Raleigh, NC, 27699-1621.This form may be returned to DWQ by the applicant, the applicant's authorized agent, or the project engineer. It is not necessary to send certificates from all of these.

Applicant's Certification

I, _____, hereby state that, to the best of my abilities, due care and diligence was used in the observation of the construction such that the construction was observed to be built within substantial compliance and intent of the 401 Water Quality Certification and Buffer Rules, the approved plans and specifications, and other supporting materials.

Signature: _____ Date: _____

Agent's Certification

I, _____, hereby state that, to the best of my abilities, due care and diligence was used in the observation of the construction such that the construction was observed to be built within substantial compliance and Intent of the 401 Water Quality Certification and

Buffer Rules, the approved plans and specifications, and other supporting materials.

Signature: _____ Date: _____

If this project was designed by a Certified Professional

I, _____, as a duly registered Professional _____ (i.e., Engineer, Landscape Architect, Surveyor, etc) in the State of North Carolina, having been authorized to observe (periodically, weekly, full time) the construction of the project, for the Permittee hereby state that, to the best of my abilities, due care and diligence was used in the observation of the construction such that the construction was observed to be built within substantial compliance and intent of the 401 Water Quality Certification and Buffer Rules, the approved plans and specifications, and other supporting materials.

Signature: _____ Registration No. _____ Date _____

Supreme Court, U.S.
FILED
JUN 15 2005
OFFICE OF THE CLERK

No. 04 - 1527

In the
Supreme Court of the United States
October Term, 2004

S. D. WARREN COMPANY,
Petitioner,
v.
MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

On Petition for Writ of *Certiorari*
to the Supreme Judicial Court of Maine

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Counsel for Amicus Curiæ

MARTIN J. NEWHOUSE
Counsel of Record
Andrew R. Grainger
Michael E. Malamut
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111-2504
Tel.: (617) 695-3660 x 202
Fax: (617) 695-3656
martinnewhouse@nelfonline.org

QUESTIONS PRESENTED

Amicus Curiæ New England Legal Foundation files the accompanying brief in support of this Court's consideration of the first question presented by Petitioner S. D. Warren Company ("Warren"):

1. Does the mere flow of water through an existing dam constitute a "discharge" under Section 401, 33 U.S.C. § 1341, of the Clean Water Act, despite this Court's holding last year in *Miccosukee* that a discharge requires the addition of water from a distinct body of water?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIÆ* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. The legal status test applied by the SJC to determine whether the flow of water through Warren's dams results in a an "addition," and thereby a "discharge" under Section 401(a) of the Clean Water Act is erroneous under the CWA and, if followed, would lead to absurd results 4

II. The SJC's Test Flatly Contradicts this Court's Teaching in *Miccosukee* 11

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York 273 F.3d 481 (2d Cir. 2001)..... 9

Commissioner v. Banks, 125 S.Ct. 826 (2005)..... 3

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000)..... 3

Dubois v. U.S. Dept. of Agriculture, 102 F.3d 1273 (1st Cir. 1996)..... 9

EEOC v. Waffle House, Inc., 534 U.S. 279 (2002)..... 3

Exxon Mobile Corp. v. Saudi Basic Indus. Corp., 125 S.Ct. 1517 (2005)..... 3

Greenfield Mills, Inc. v. Macklin, 361 F.3d 934 (7th Cir. 2004)..... 8

Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003)..... 3

North Carolina v. FERC, 112 F.3d 1175 (D.C. Cir. 1997)..... 6,7,10

Palazzolo v. Rhode Island, 533 U.S. 606 (2001)..... 3

S.D. Warren Co. v. Board of Envtl. Protection, 868 A.2d 210 (Me.

2005)..... 7,8,10,11

South Florida Water Mgmt. Dist. v. Miccosukee, 541 U.S. 95 (2004)..... 1,3,4,11,12

STATUTES, RULES, AND REGULATIONS

16 U.S.C. §§ 791(a) *et seq.* (Federal Power Act)..... 5

16 U.S.C. § 797(e)..... 5

33 U.S.C. §§ 1251 *et seq.* (Clean Water Act)..... 2

33 U.S.C. § 1251(a)..... 8

33 U.S.C. § 1341(a) (Clean Water Act § 401(a))..... 1,3,4,5,6,7,8,9,10,11,12

33 U.S.C. §§ 1362(12) (Clean Water Act § 502(12))..... 6

Sup. Court R. 37.2(a)..... 2,3

MISCELLANEOUS

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d. ed. 1992)..... 8

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On Petition for Writ of *Certiorari*
to the Supreme Judicial Court of Maine

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIÆ*

Amicus Curiæ New England Legal Foundation ("NELF") seeks to bring to the Court's attention its views and the views of its supporters concerning the need for this Court to clarify the correct test to be used to determine whether a discharge has occurred within the meaning of Section 401(a) of the Clean Water Act, 33 U.S.C. § 1341(a). The need for such clarification is urgent because of the Supreme Judicial Court of Maine's manifestly erroneous use of a purported change in the legal status of the water as the determinative factor rather than whether an actual addition has been made to the body of water at issue, which this Court indicated should be the test in *South Florida Management District v. Miccosukee Tribe*, 541 U.S. 95

(2004).[1]

Amicus Curiæ NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States.

NELF's members are affected by the business climate in New England, which depends, in part, upon an application of the federal laws enacted to protect the environment, such as the Clean Water Act ("CWA"), 33 U.S.C. §§1251, *et seq.*, in a way that fairly reflects Congress's intentions as embodied in such statutes. Especially in a time of diminishing oil and gas reserves, it is important that costly regulatory requirements be imposed on renewable sources of energy, such as hydroelectric dams, only if they are well grounded in the provisions of the CWA. NELF's members and supporters believe that a balanced and reasonable approach to regulation, which respects the economic efficiencies of free market forces, is essential for the maintenance of a robust business climate, which in turn is essential to the long-term success of the region's businesses.

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1 Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that neither counsel for Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities.[2] *Amicus* believes that serious negative consequences for all businesses and other activities that involve use of the national waterways may well result from the Maine Supreme Judicial Court's novel and manifestly erroneous expansion of the meaning of "discharge" as used in Section 401(a) of the CWA. *Amicus* believes that this brief provides an additional perspective which may aid the Court in determining whether to grant this petition for a writ of *certiorari*. Pursuant to Supreme Court Rule 37.2 (a), counsel for Amicus has submitted consents by all parties to the filing of this Brief.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the Brief of Petitioner S.D. Warren Company ("Warren").

SUMMARY OF ARGUMENT

This petition for *certiorari* to the United States Supreme Court seeks review of the Supreme Judicial Court ("SJC") of Maine's determination that a discharge occurs within the meaning of Section 401(a) of the Clean Water Act, 33 U.S.C. § 1341(a) from the operation of Warren's dam projects on the Presumpscot River in Maine. In reaching this conclusion, the SJC engaged in a startling departure from prior federal jurisprudence under the CWA, including the recent decision by this Court in *South Florida Water Management District v.*

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2 *See, e.g., Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005); *Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

Miccosukee Tribe, 541 U.S. 95 (2004) ("*Miccosukee*"). Eschewing these precedents, the Maine court applied a novel test to determine the existence of a discharge, holding that a purported change in the river water's legal status as it passes through Warren's dams, *i.e.*, its alleged transformation back into waters of the United States as it emerges after a brief passage through the "private control" of the dams, constitutes an "addition" sufficient for a finding that a discharge occurs under Section 401(a). The Maine Court's new test is manifestly erroneous because it is based on no tangible change in the water of the river, bears no logical connection to the purposes served by the CWA, and leads to irrational results. Moreover, the SJC's test directly contradicts this Court's decision in *Miccosukee*, which confirms that where, as in this case, water is merely transferred from one portion of a body of water to another portion of the same body of water, no addition—and, therefore, no discharge—can occur within the meaning of Section 401(a). This Court should grant Warren's petition in order to address the conflict with *Miccosukee* that the SJC has now created.

ARGUMENT

I. The legal status test applied by the SJC to determine whether the flow of water through Warren's Dams results in an "addition," and thereby a "discharge," under Section 401(a) of the Clean Water Act is erroneous under the CWA and, if followed, would lead to absurd results.

The primary issue before the SJC in this case was whether the operation of Warren's five hydroelectric dam projects on the Presumpscot River in Maine result in a "discharge" to the waters of the river within the meaning of Section 401(a) of the

CWA . To answer that question, the SJC had to decide whether Warren's dam projects cause an "addition" to the river's waters, since, as explained below, an "addition" is required for there to be a "discharge." Faced with a situation in which, on the undisputed facts, no actual addition to the waters of the Presumpscot River results from the operation of Warren's dams, the SJC, in a breathtaking departure from federal decisions in this area, focused on a purported and wholly intangible change in the water's status while it passes through Warren's dams. The SJC asserted that for a few moments the water is no longer water of the United States because it is under private control and that an "addition" occurs when the water regains national status upon leaving the dams. Whatever the merit of the SJC's assertions regarding the water's change in legal status, its focus on a wholly intangible change to the river's water as the basis for its conclusion that Section 401(a) applies is incompatible with the purpose of the CWA, which was intended to deal with the tangible issue of water quality in this country.

The Federal Power Act ("FPA"), 16 U.S.C. §§ 791a, *et seq.*, vests in the Federal Energy Regulatory Commission ("FERC") the responsibility for licensing the construction, operation and maintenance of hydroelectric dams, such as the dams owned and operated by Warren that are at issue in this case. 16 U.S.C. § 797(e). Section 401(a) of the CWA, 33 U.S.C. § 1341(a), provides that, where an applicant is seeking a federal license for any activity that "may result in any *discharge* into the navigable waters" (emphasis added) the applicant must provide the licensing agency with a certification from the state in which that discharge may occur that the discharge will be in compliance with the water quality standards of both the CWA

and the affected state. 33 U.S.C. § 1341(a). Accordingly, where, the owner and operator of a hydroelectric dam applies to FERC for a renewal of its federal license pursuant to the FPA, it must obtain state water quality certification *if* the operation of its dam results in a "discharge" within the meaning of Section 401(a) of the CWA.

In this case, Warren applied to FERC for the re-licensing of the five hydroelectric dam projects that it owns and operates on the Presumpscot River in Maine. Because of the interplay of the FPA and Section 401(a) of the CWA, Warren was required to apply for water quality certification from the Maine Department of Environmental Protection ("DEP"). This Warren did under protest. Warren's position was, and remains, that the operation of its dams does not result in a discharge into the waters of the Presumpscot River. Therefore it asserts that no DEP certification is required under Section 401(a).

Warren's argument that the activities of its dams do not cause a discharge under Section 401(a) is based on the legal requirements of the CWA and the undisputed facts surrounding the dams' operations. Under the CWA, for there to be a discharge within the meaning of Section 401(a) there must be an "addition" of something to the water body at issue. *See* Section 502(12) of the CWA, 33 U.S.C. §1362(12);[3] *North*

3 33 U.S.C. § 1362(12) states: "The term 'discharge of any pollutant' and the term 'discharge of pollutants' each mean (A) any *addition* of any pollutant to navigable waters from any point source, (B) any *addition* of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." (Emphasis added.)

Carolina v. FERC, 112 F. 3d 1175, 1188 (D.C. Cir. 1997) (because the volume of water passing through the dam's turbines decreased, there was no addition and, therefore, no discharge). It is undisputed that Warren's hydroelectric dam projects are operated in "run-of-river" mode, *i.e.*, outflow from each dam is approximately equal to inflow on an instantaneous basis during normal operating conditions, App. At A-120, and the operation of the dams neither removes nor adds any substance, not even water from or to the river's waters, App. At A-87 to A-88, A-106 to A-110, A-120 to A-121.

Even as it agreed with the premises of Warren's argument, the SJC denied Warren's appeal. The SJC acknowledged that the operation of Warren's dams neither subtracts from nor adds to the total amount of water in the river. *S.D. Warren Co. v. Board of Environmental Protection*, 868 A. 2d 210, 216 (2005) (*"Warren"*). Likewise, it recognized that "[a]n 'addition' is the fundamental characteristic of any discharge." *Id.*, 868 A. 2d at 215 (citing *North Carolina v. FERC*, 112 F. 3d 1175, 1187 (D.C. Dir. 1997). Nonetheless, the SJC, by improperly altering the test to be applied, concluded that the operation of the dams results in a discharge under Section 401(a) of the CWA.

Simply put, because the court below could not find an actual "discharge" resulting from the operation of the dams, it invented a new "control" test for determining the existence of a discharge based on a dubious legal distinction. In a truly novel chain of reasoning, the Maine SJC determined that when the river's waters pass through Warren's dams, those waters are no longer waters of the United States because for a few moments they are under private control. The Court then concluded "[b]ecause these waters have lost their status as *waters of the*

United States, when they are redeposited into the natural course of the river it results in an addition to the *waters of the United States*." *Warren*, 868 A. 2d at 216 (emphasis in the original).

In reaching this conclusion, the SJC completely disconnected the determination of whether there is a discharge under the CWA from the question of whether an addition to the waters at issue has actually occurred. Even assuming, *arguendo*, that the SJC was right when it reasoned that, while passing through Warren's dams, the waters of the Presumpscot River cease to be waters of the United States, the SJC was manifestly wrong in using this putative change in the waters' status as a test for whether or not an "addition," and thereby a discharge, occurs within the meaning of Section 401(a).

Unlike the SJC, other courts called upon to construe the meaning of an "addition" under the CWA have applied a common sense normal English language meaning to that term. They have interpreted it as referring to a physical, chemical, biological, or other substantive alteration in the water body at issue, not merely a momentary change in the water's legal status. The word "addition" is commonly defined to mean "something added." *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992) at 20. In the context of the CWA, the purpose of which is to preserve the "chemical, physical and biological integrity of the nation's water supply," 33 U.S.C. § 1251(a); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 948-949 (7th Cir. 2004), to add "something" has been found consistently to mean an actual alteration in one or all of these three dimensions—chemical, physical or biological, *see, e.g.*,*id.*, 361 F.3d at 949 (addition consists of "discharge of dredged material, such as that

removed from the supply pond, into a contiguous body of water or wetland"), and not to a mere change in name, title or control. Indeed, without more, these latter changes—such as the change that the SJC purported to identify in this case, *i.e.*, the river water's purported temporary loss of status as United States waters—can have no impact on the very aspects of the nation's water supply with which the CWA is concerned. Logically, therefore, the test for an "addition" under the CWA cannot hinge on such factors.[4]

The inherent weakness of the SJC's approach, and its lack of grounding in the CWA, is demonstrated by the fact that it proves too much and, if followed, would lead to absurd results. Thus, under the SJC's test all non-federally operated dam projects, without exception, would result in a discharge within the meaning of Section 401(a), because all such projects would inevitably result in a redeposit into the waters of the United

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4 Significantly, the case cited by the SJC in support of its new test for an "addition" does not support it. Specifically, *Dubois v. U.S. Dept Agriculture*, 102 F.3d 1273 (1st Cir. 1996), is distinguishable from this case because it involved the transfer of water, through snowmaking pipes, from a river to a pond, which the Court of Appeals for the First Circuit found were two distinct water bodies. In this case, only one water body, the Presumpscot River, is involved. In the course of its discussion of the applicability of the CWA to the facts before it, the Court of Appeals in *Dubois* stated that the status of the water in that case was private as part of its criticism of the district court for not considering that pristine waters of Loon Pond were removed and mixed with more polluted waters prior to discharge back into Loon Pond. *Dubois*, 102 F.3d at 1297. The Court of Appeals at no time indicated that a change in the status of control of a water source alone could be an "addition." *See Dubois*, 102 F.3d 1273. Therefore, under *Dubois*, even if it is accepted, *arguendo*, that the water's status while in the dam does change, that change in status is insufficient to create an "addition."

States, whether or not an actual addition to the water has occurred. As the SJC itself recognized, even as it found that an "addition" has occurred, "Warren is not adding more water to the river." *Warren*, 868 A.2d at 216. In this way, the SJC's test makes meaningless the requirements of Section 401(a).

Further, the SJC's test arguably would require a finding that an "addition" has occurred even where a dam's operation actually reduces the volume of water in a river, because even a smaller volume of water reentering the river after passing through the dam would still be "an addition *to the waters of the United States*." *Warren*, 868 A.2d at 216 (emphasis in the original). Such a result would contradict the holding in *North Carolina v. FERC*, 112 F.3d 1175, 1188 (D.C. Cir. 1997), which the SJC in another connection cites with favor (868 A.2d at 215), that there cannot be an addition or a discharge under the CWA where there is a decrease in the volume of water passing through a dam's turbines.

But the chief defect of the SJC's novel test is that it has unmoored the determination of whether there is a discharge, which is required to decide whether Section 401(a) of the CWA applies, from what is actually occurring physically, chemically, and biologically in the water body at issue. Given that the CWA is concerned with these parameters, any test that ignores them cannot serve the purposes of that statute. Accordingly, the SJC's novel test in this case is without basis in the CWA and should be rejected by this Court.

II. The SJC's Test Flatly Contradicts this Court's Teaching in *Miccosukee*

The change in legal control test employed by the SJC rests on the Maine court's view that when water is removed from a body of water, the simple redeposit of that same water back into the water body from which it came can qualify as an "addition" and, therefore, a discharge under the CWA. *Warren*, 868 A. 2d at 215. That the SJC is mistaken in this regard was made clear by this Court in *Miccosukee*.

Quoting with approval the Second Circuit's observation in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2d Cir. 2001,) that, "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot," 273 F. 3d at 492, this Court in *Miccosukee* affirmed that where, as here, water is simply being moved from one part of a water body to another part of the same water body (in this case, the Presumpscot River), there cannot be an "addition" under the CWA. 541 U.S. at 109. Plainly, under *Miccosukee*, the fact that, arguably, the river's water might briefly come under private control (in this case as it passes through Warren's dams) while it flows from one part of the river to another is irrelevant under the CWA, since no addition can have occurred.[5]

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5 *Miccosukee* also makes it clear that, to the extent that the Presumpscot River's waters arguably are diverted from their natural path as they pass through Warren's dam projects, no addition under the CWA has occurred. As the Court observed, "[t]he [respondent] does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of any pollutants." 541 U.S. at 108. Likewise, a diversion of the Presumpscot River's waters

In short, this Court has made it clear in *Miccosukee* that the physical removal from and the replacement of the same water into the same body of water cannot quality as an "addition" under the CWA. From this the conclusion is inescapable that a theoretical "removal" based purely on a questionable, brief change in legal status is likewise incapable of meeting that requirement. This court should therefore grant the *certiorari* petition to address the conflict with its teaching in *Miccosukee* that has now been created by the Maine court's use of an erroneous test to determine whether an "addition," and, thereby, a "discharge," has occurred within the meaning of the CWA.

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through Warren's dams cannot constitute an addition under *Miccosukee*'s teaching.

CONCLUSION

For the reasons stated above, this Court should grant the petition of Petitioner S.D. Warren Company for a writ of *certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,

Martin J. Newhouse
Counsel of Record
for Amicus Curiæ
Andrew R. Grainger
Michael E. Malamut
New England
Legal Foundation
150 Lincoln Street
Boston, MA 02111-2504
Telephone: (617) 695-3660 x 202
Facsimile: (617) 695-3656
martinnewhouse
@nelfonline.org

Dated: June 15, 2005

(25)

No. 04-1527

Supreme Court, U.S.
FILED
NOV 25 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Writ Of Certiorari To The Maine Supreme Judicial Court

JOINT APPENDIX

MATTHEW D. MANAHAN
(*Counsel of Record for Petitioner S.D. Warren Company*)
WILLIAM J. KAYATTA, JR.
NICHOLAS D. LIVESAY
PIERCE ATWOOD LLP
One Monument Square
Portland, Maine 04101
(207) 791-1100
(207) 791-1350 Fax

G. STEVEN ROWE
Attorney General
PAUL STERN
Deputy Attorney General
GERALD D. REID
Assistant Attorney General
CAROL A. BLASI
Assistant Attorney General
(*Counsel of Record for Respondent Maine Department of Environmental Protection*)
Six State House Station
Augusta, Maine 04333-0006
(207) 626-8582
(207) 626-8812 Fax

RICHARD J. LAZARUS
(*Counsel of Record for Respondents American Rivers and Friends of the Presumpscot River*)
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9129
(202) 662-9408 Fax

Petition For Certiorari Filed May 12, 2005
Certiorari Granted October 11, 2005

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Relevant Docket Entries:

Cumberland County Superior Court (Docket No. AP-3-30) ..... App. 1

Maine Supreme Judicial Court (Docket No. CUM-04-314) ..... App. 3

FERC Final Environmental Impact Statement for Hydropower Licenses, Presumpscot River Projects, June 2002 (Partial Document) ..... App. 4

Maine Department of Environmental Protection, Water Quality Certification Order, April 30, 2003 [reprinted in Petition Appendix at A-74]

Maine Board of Environmental Protection Order, Findings of Fact and Order on Appeal, October 2, 2003 [reprinted in Petition Appendix at A-35]

Cumberland County Superior Court Order, May 4, 2004 [reprinted in Petition Appendix at A-19]

Maine Supreme Judicial Court Decision, February 15, 2005 [reprinted in Petition Appendix at A-1]

RELEVANT DOCKET ENTRIES

S.D. Warren Co. v. Maine Dep't of Envtl. Prot.
Cumberland County Superior Court
Docket No. AP-3-30

11/03/03 Plaintiff's 80C Appeal filed, 10-31-03.

12/09/03 American Rivers and Friends of the Presumpscot River's motion to intervene and memorandum in support of intervention with certificate of service filed.

12/24/03 Certification of Amended Record with Attachments 279 thru 282 filed from the Department of Environmental Protection filed.

01/06/04 Petitioner, S.D. Warren Company Petitioner filed, Brief filed.

01/26/04 Order filed. (Cole, J.) JUDGMENT:

The court hereby grants intervenors American Rivers and Friends of the Presumpscot Rivers [sic] motion to intervene and memorandum in support of intervention.

02/06/04 Intervenors, American Rivers and Friends of the Presumpscot Rivers [sic], Brief with exhibit [sic] A & B filed.

02/09/04 Respondents, Maine Department of Environmental Protection and Board of Environmental Protection's brief filed.

02/23/04 Plaintiff's Reply Brief filed.

03/23/04 Respondents' motion to strike with incorporated memorandum of law with exhibits A-C filed.

03/25/04 Letter from Matthew Manahan, Esq. requesting court to review the attached U.S. Supreme Court decision made in *South Florida [Water]*

Management District vs. Miccosukee Tribe of Indians filed.

03/29/04 Petitioner S.D. Warren Company's Memorandum in Opposition to Respondents Motion to Strike filed.

04/09/04 Hearing held on 80C Appeal.

05/04/04 Order filed. (Cole, J.) JUDGMENT:

This court denies petitioner, Warren's appeal and affirms the decision of the BEP, pursuant to M.R.Civ.P. 80C.

05/26/04 Petitioner's Notice of Appeal from 5-4-04 Judgment filed.

Maine Supreme Judicial Court
Docket No. CUM-04-314

05/24/04	Petitioner's Notice of Appeal to the SJC, filed by M. Manahan
07/16/04	Brief of Petitioner and Appendix I and II, filed by M. Manahan
08/16/04	Brief of Intervenors American Rivers and Friends of the Presumpscot River, filed by S. Mahoney
08/16/04	Brief of Appellee Maine Department of Environmental Protection, filed by C. Blasi
09/02/04	Reply Brief of Petitioner, S.D. Warren Company, filed by M. Manahan
11/16/04	Oral Argument
01/07/05	Letter to Clerk, from M. Manahan Regarding FERC *City of Augusta* Order
01/12/05	Letter to Clerk, from C. Blasi Regarding FERC *City of Augusta* Order
01/12/05	Letter to Clerk from S. Mahoney Regarding FERC *City of Augusta* Order
02/15/05	Supreme Judicial Court Opinion, affirming the judgment of the Superior Court

FINAL ENVIRONMENTAL IMPACT STATEMENT FOR HYDROPOWER LICENSES

PRESUMPSCOT RIVER PROJECTS

Dundee Project
FERC Project No. 2942-005

Gambo Project
FERC Project No. 2931-002

Little Falls Project
FERC Project No. 2941-002

Mallison Falls Project
FERC Project No. 2932-003

Saccarappa Project
FERC Project No. 2897-003

Federal Energy Regulatory Commission
Office of Energy Projects
Division of Environmental and Engineering Review
888 First Street, NE
Washington, D.C. 20246

June 2002

* * *

EXECUTIVE SUMMARY

On January 22, 1999, the S.D. Warren Company (S.D. Warren) filed applications for new licenses for five projects (herein referred to as the Presumpscot River projects) with the Federal Energy Regulatory Commission (FERC or Commission). The five projects are known as the Dundee Project (FERC No. 2942-005), Gambo Project (FERC No. 2931-002), Little Falls Project (FERC No. 2941-002), Mallison Falls Project (FERC No. 2932-003), and Saccarappa Project (FERC No. 2897-003). The five projects have installed capacities of 2,400 kilowatts (kW), 1,900

kW, 1,000 kW, 800 kW, and 1,350 kW, respectively. S.D. Warren does not propose any new capacity at any of the five projects. The project licenses expired on January 26, 2001. The existing projects are located on the Presumpscot River in Cumberland County, Maine.

In this multiple project Final Environmental Impact Statement (FEIS), we analyze and evaluate the effects associated with the issuance of new licenses for the existing hydropower projects, and recommend conditions for inclusion in any licenses issued. For any license issued, the Commission must determine that the project adopted will be best adapted to a comprehensive plan for improving or developing the waterway. In addition to the power and development purposes for which licenses are issued, the Commission must give equal consideration to energy conservation, the protection and enhancement of fish and wildlife, aesthetics, cultural resources, and the protection of recreational opportunities. This FEIS for the Presumpscot River projects reflects the staff's consideration of these factors.

Based on our consideration of all developmental and nondevelopmental resource interests related to the projects, we conclude that the following measures to protect and enhance environmental resource values should be included in any licenses issued for the Presumpscot River projects (measures apply to all five projects unless noted otherwise): (1) operate in a ROR mode; (2) continue daily headpond monitoring to facilitate better headpond control; (3) avoid impoundment drawdowns during the months of May and June and notify state fisheries personnel prior to any planned drawdowns; (4) after drawdowns, implement impoundment refill procedures as allowed by the lake level management plan (LLMP) for Sebago Lake; (5) provide

seasonally adjusted minimum flows to the bypassed reaches at Dundee, Gambo, and Mallison Falls; (6) prepare and implement a headpond elevation and minimum flow monitoring plan; (7) design and install upstream eel passage facilities; (8) implement measures (shutdowns) to protect downstream-migrant adult eels during the autumn season; (9) conduct a 3-year downstream migrating eel study to assess timing of peak eel movement, to determine the optimum time for shutdowns; (10) design and install upstream and downstream fish passage facilities for shad and river herring at each dam in a phased approach; (11) develop a fish passage implementation plan; (12) reserve the U.S. Deportment of the Interior (Interior's) authority to prescribe additional fishways; (13) maintain a buffer zone on any licensee-owned lands within the project boundary of up to 200 feet of the normal high-water level at the Dundee and Gambo project; (14) monitor and remove trees that pose hazards to boating downstream of the Gambo Project; (15) improve portage around dams; (16) improve angler and vehicular access to the bypassed reaches; (17) conduct a recreational use monitoring study in conjunction with the first Form 80 filing after construction of the proposed recreational facilities, and report monitoring results every 12 years thereafter; (18) develop and implement a revised final recreational facilities enhancement plan including resolution of the location of proposed portage and car-top boating access points, final designs for new facilities and improvements to existing facilities, and an implementation schedule; and (19) develop and implement an historic properties management plan including provisions to consult with the SHPO on non-routine maintenance, to mitigate adverse effects on historic properties, and to protect the Cumberland and Oxford Canal.

We recommend these environmental measures to protect and enhance water quality, fisheries, terrestrial, land use, aesthetics, recreational, and cultural resources. In addition, the electricity generated from the projects would be beneficial because it would continue to reduce the use of fossil-fuel, electric generating plants; conserve nonrenewable energy resources; and continue to reduce atmospheric pollution.

Section 10(j) of the Federal Power Act (FPA) requires the Commission to include license conditions based on recommendations provided by the federal and state fish and wildlife agencies. We have addressed the concerns of the federal fish and wildlife agency and made recommendations, some of which are inconsistent with those of the agency. In the DEIS, we made a preliminary determination that some of the recommendations of the U.S. Fish and Wildlife Service conflict with the public interest standard of Section 4(e) and the comprehensive planning standard of Section 10(a) of the FPA. Pursuant to Section 10(j) of the FPA, we were able to partially resolve issues of shoreline management plans and minimum flows (see section 6.3 and table 63 of this document).

Under Section 18 of the FPA, Interior filed preliminary fishway prescriptions on February 2, 2001, and filed final fishway prescriptions on February 5, 2002. Interior also requested that the Commission reserve authority for Interior to prescribe such fishways as may be necessary during the term of any license issued. The reservation includes authority to prescribe fishways for Atlantic salmon, American shad, alewife, blueback herring, and/or American eels in the event that additional prescriptions beyond those already provided are necessary in the future.

Based on our independent analysis of the projects, including our consideration of all relevant economic and environmental concerns, we conclude that the Dundee, Gambo, Little Falls, Mallison Falls, and Saccarappa projects, as proposed by S.D. Warren and with our additional staff-recommended enhancement measures, would be best adapted to a comprehensive plan for the proper use, conservation, and development of the Presumpscot River.

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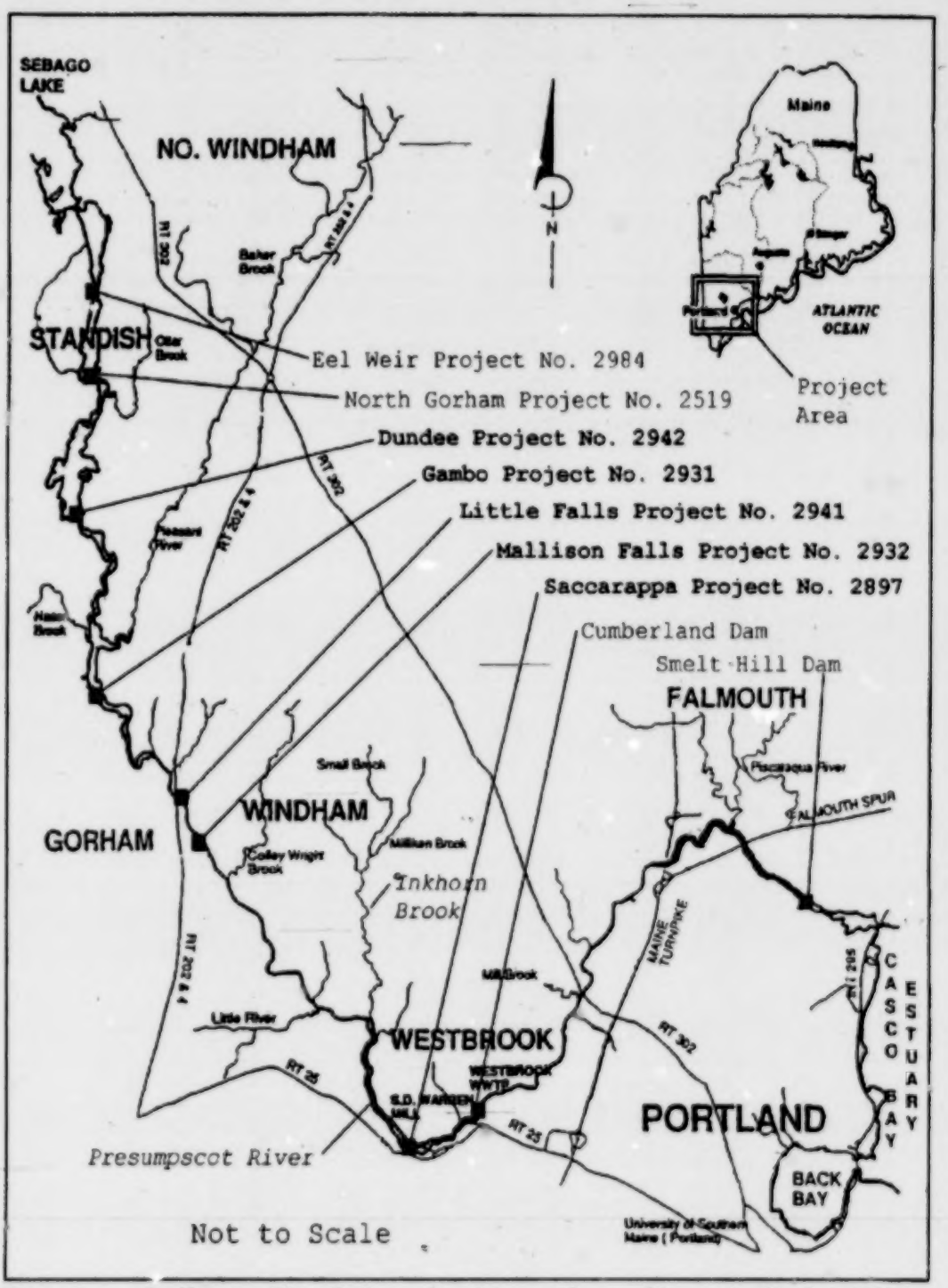

Figure 1. Presumpscot River Projects - location map (Source: License Application, 1999, as modified by staff).

* * *

2.1.1 Project Facilities and Operations

The Dundee Project consists of the following existing facilities (figure 2): (1) a 1,492-foot-long dam, consisting of a 175-foot-long, 50-foot-high earthen east embankment; a 1,050-foot-long, 50-foot-high earthen west embankment; a 90-foot-long concrete non-overflow section; a 150-foot-long, 42-foot-high concrete spillway; and a 27-foot-long, gated concrete canal intake structure; (2) a 1.7-mile-long impoundment extending from the Dundee dam upstream to the tailwaters of the North Gorham Project (FERC Project No. 2519), with a surface area of approximately 197 acres at normal headpond elevation of 187.22 feet U.S. Geological Survey (USGS) datum; (3) a 44-foot-wide by 74-foot-long reinforced concrete powerhouse which is integral to the spillway section of the dam; (4) three horizontal Francis turbines direct-connected to the generators, each with an installed capacity of 800 kW for a total project installed capacity of 2,400 kW; (5) a 1,075-foot-long bypassed reach; (6) a 1,075-foot-long, 30-foot-wide, and 11-foot-deep tailrace; (7) two 10-mile-long, 11-kilovolt (kV) transmission lines; and (8) other appurtenances.

The Gambo Project consists of the following existing facilities (figure 3): (1) a 250-foot-long, 24-foot-high concrete overflow section, a concrete sluice gate structure, and 50-foot-long canal intake structure; (2) a 3.3-mile-long impoundment extending from the Gambo dam upstream to the tailwaters of the Dundee Project, with a surface area of approximately 151 acres at normal headpond elevation of 135.13 feet USGS; (3) a 737-foot-long and 15-foot-deep concrete-lined intake canal; (4) a 47-foot-wide by 78-foot-long reinforced concrete and brick powerhouse; (5) two vertical Francis turbines direct-connected to generators, each with an installed capacity of 950 kW for a total project installed capacity of 1,900 kW; (6) a 300-foot-long bypassed reach; (7) an 8-mile-long, 11-kV transmission line; and (8) other appurtenances.

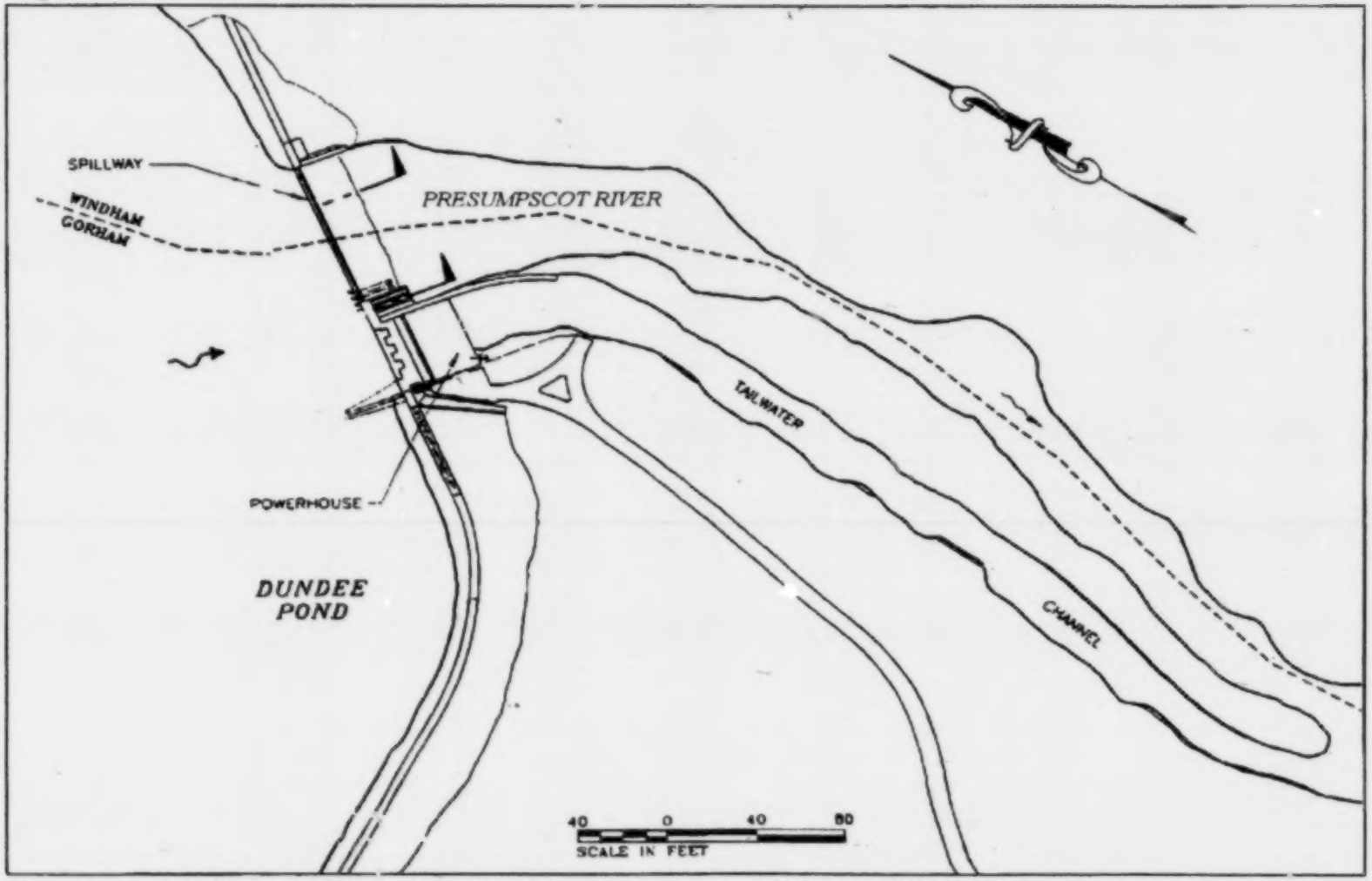

Figure 2. Dundee Project facilities (Source: License Application, 1999, as modified by staff).

The Little Falls Project consists of the following existing facilities (figure 4): (1) a 331-foot-long and 14-foot-high reinforced concrete and masonry dam incorporating a 160-foot-long spillway section, 101.5 foot-long spillway and sluice gate section, and a 70.5-foot-long intake structure; (2) a 1.7-mile-long impoundment extending from the Little Falls dam upstream to the Gambo dam, with a surface area of approximately 29 acres at normal headpond elevation of 108.7 feet USGS; (3) a 25-foot-wide by 95-foot-long masonry powerhouse which is integral to the dam; (4) four vertical Francis turbines direct-connected to generators, each with an installed capacity of 250 kW for a total project installed capacity of 1,000 kW; (5) a 300-foot-long bypassed reach; (6) an 11-kV transmission line tied into the Gambo Project transmission line; and (7) other appurtenances.

The Mallison Falls Project consists of the following existing facilities (figure 5): (1) a 358-foot-long, 14-foot-high reinforced concrete, masonry, and cut granite diversion dam consisting of a 113.5-foot-long cut granite spillway section, a 174.5-foot-long reinforced concrete spillway section, and a 70-foot-long canal headgate structure; (2) a 0.5-mile-long impoundment extending from the Mallison Falls dam upstream to the tailwaters of the Little Falls Project, with a surface area of approximately 8 acres at normal headpond elevation of 90.6 feet USGS; (3) a 675-foot-long, 41-foot-wide, and 6-foot-deep bedrock-lined intake canal; (4) a 33-foot-wide by 51-foot-long reinforced concrete and masonry powerhouse; (5) two vertical Francis turbines direct-connected to generators, each with an installed capacity of 400 kW for a total project installed capacity of 800 kW; (6) a 675-foot bypassed reach; (7) an 11-kV transmission line tied into the Gambo Project transmission line; and (8) other appurtenances.

The Saccarappa Project consists of the following existing facilities (figure 6): (1) a 322-foot-long diversion dam consisting of a 220-foot-long, 10-foot-high concrete overflow section and a 102-foot-long, 12-foot-high concrete overflow section; (2) a 5.0-mile-long impoundment extending from the Saccarappa dam upstream to the tailwaters of the Mallison Falls Project, with a surface area of approximately 87 acres at normal headpond elevation of 69.95 feet USGS; (3) two bypassed reaches measuring 475 and 390 feet long; (4) a 380-foot-long and 36-foot-wide intake canal cut into bedrock; (5) a 49-foot-wide by 71-foot-long masonry powerhouse; (6) three horizontal Francis turbines direct-connected to generators, each with an installed capacity of 450 kW for a total project installed capacity of 1,350 KW; (7) a 345-foot-long tailrace formed by a 33-foot-high guard wall; (8) a 1-mile-long, 2.3-kV transmission line/generator lead; and (9) other appurtenances.

The Presumpscot River projects operate continuously to generate electricity that is used at S.D. Warren's paper mill at Westbrook. Under typical daily operations, S.D. Warren maximizes output by manually controlling the projects in response to flow inputs from S.D. Warren's upstream Eel Weir Project (FERC No. 2984), located at the outlet of Sebago Lake, and various minor tributaries to the Presumpscot River downstream of the Eel Weir Project. The licensee operates the projects in a run-of-river (ROR) mode so that the headponds are maintained at near constant levels year round. Because the powerhouses are manually operated, daily headpond levels typically fluctuate by 0.4 foot.

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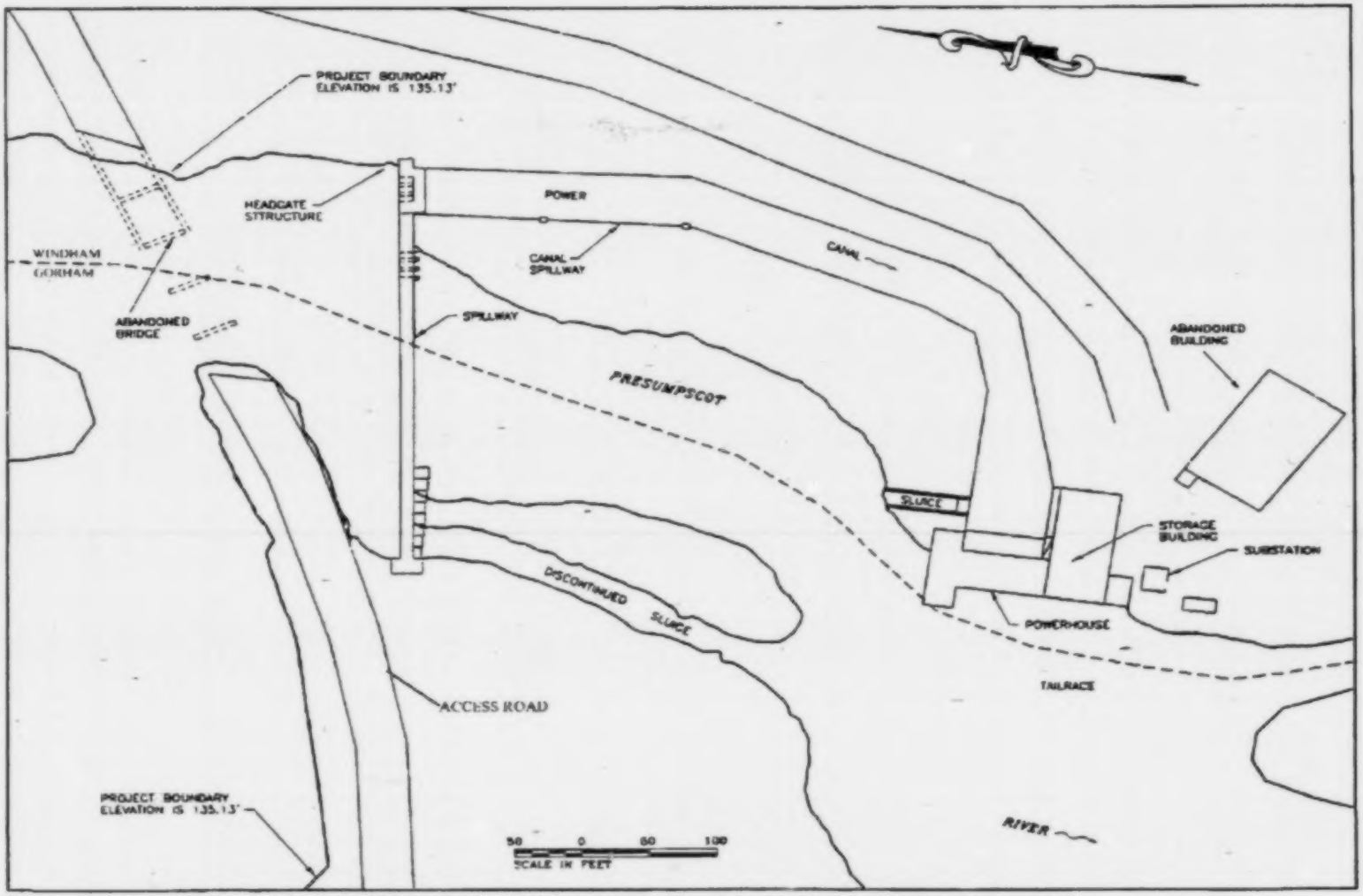


Figure 3. Gambo Project facilities (Source: License Application, 1999, as modified by staff).

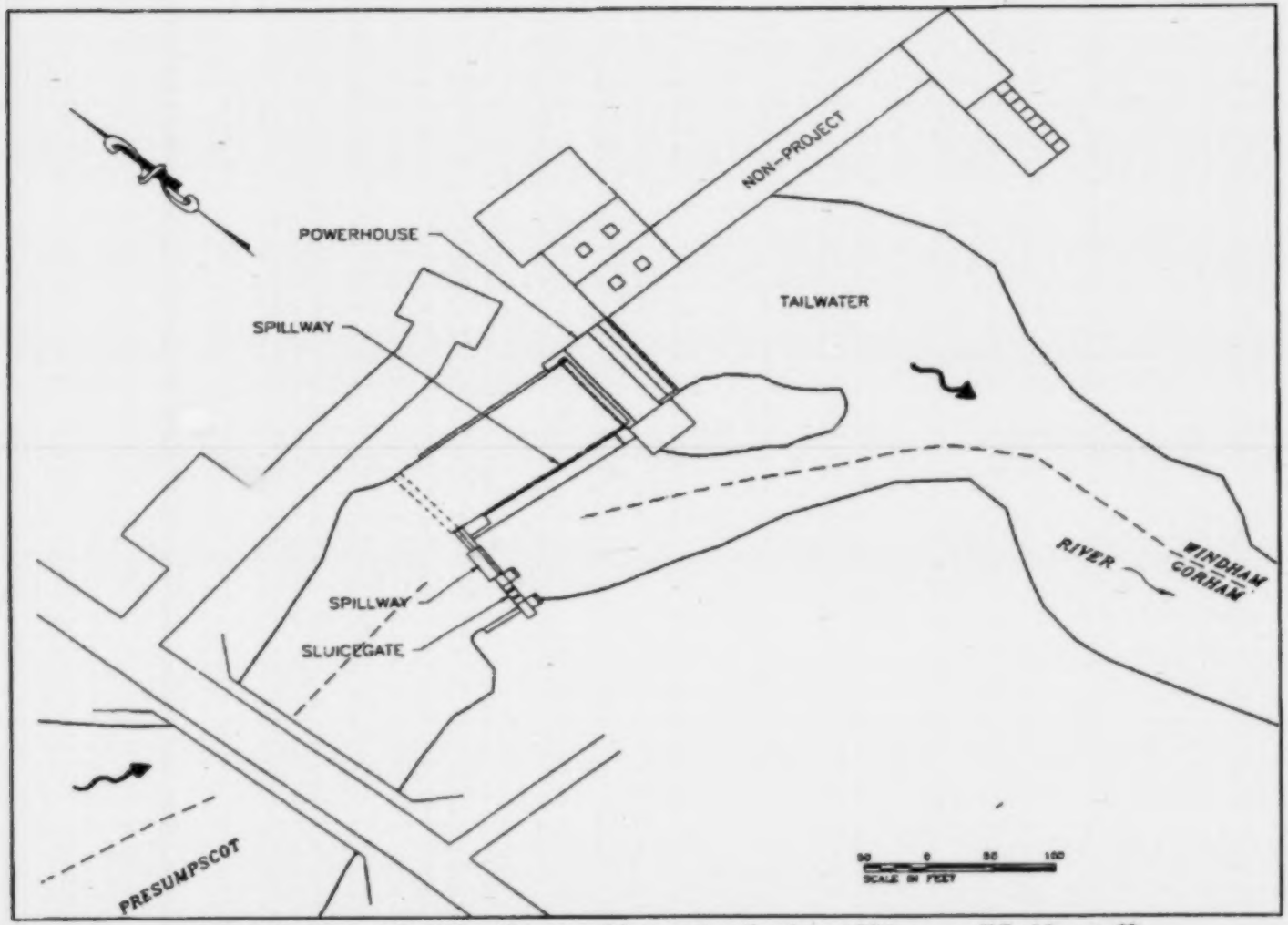


Figure 4. Little Falls Project facilities (Source: License Application, 1999, as modified by staff).

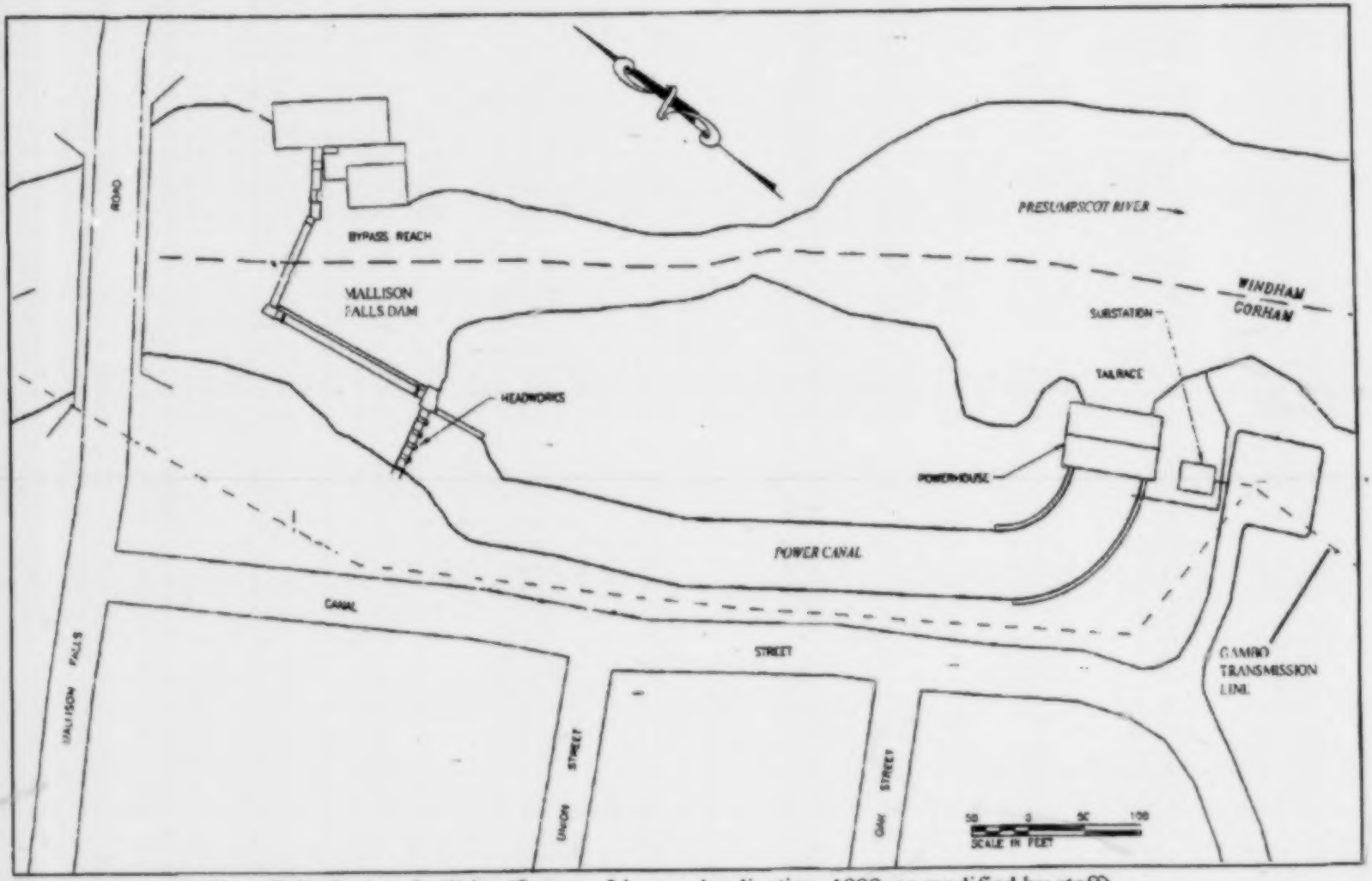


Figure 5. Mallison Falls Project facilities (Source: License Application, 1999, as modified by staff).

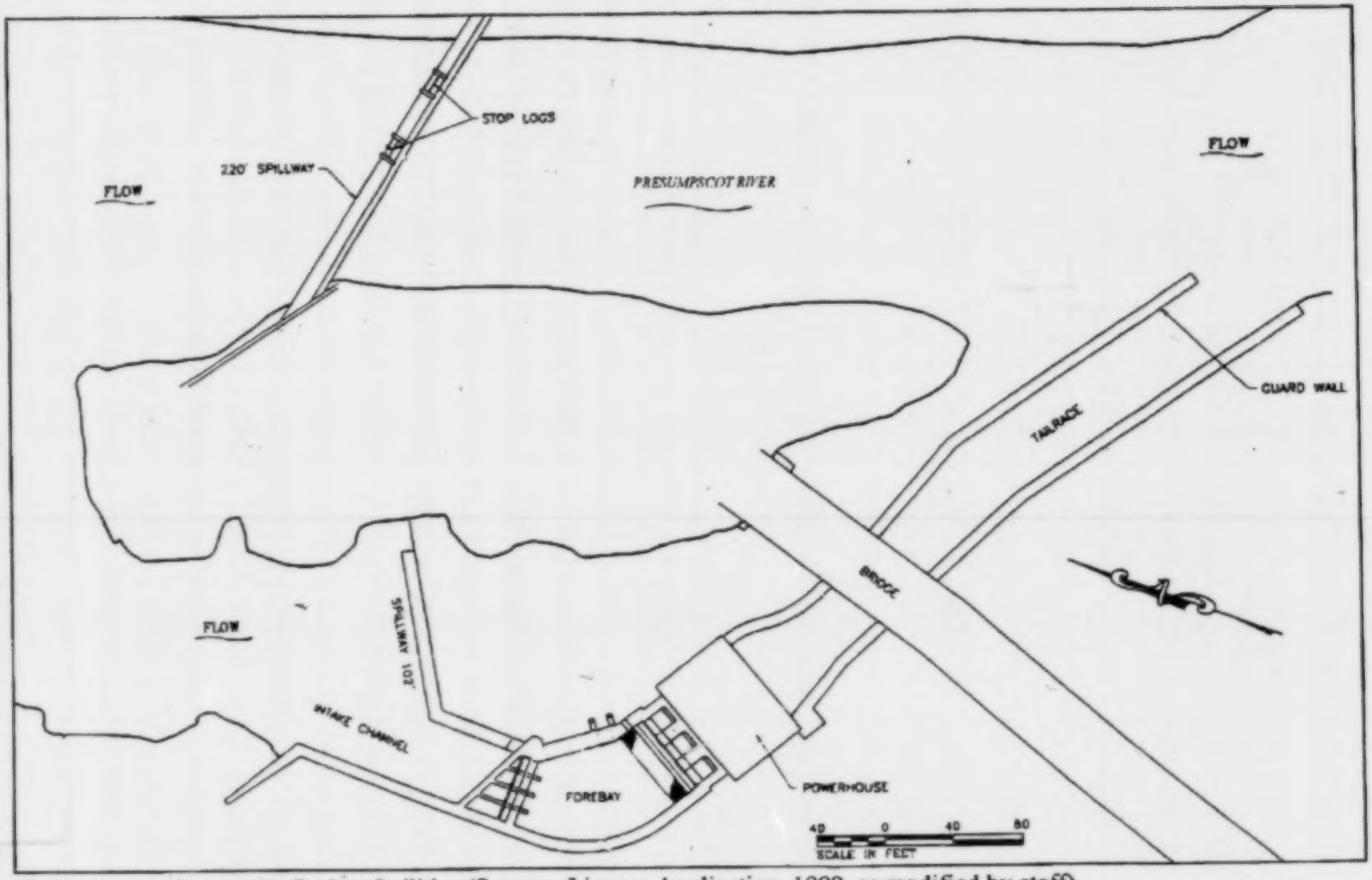
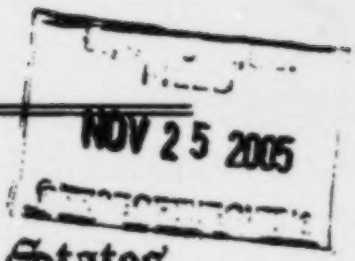


Figure 6. Saccarappa Project facilities (Source: License Application, 1999, as modified by staff).

No. 04-1527



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On Writ Of Certiorari To The Maine Supreme Judicial Court

BRIEF FOR PETITIONER

WILLIAM J. KAYATTA, JR.
MATTHEW D. MANAHAN
(*Counsel of Record*)
NICHOLAS D. LIVESAY
PIERCE ATWOOD LLP
One Monument Square
Portland, Maine 04101
(207) 791-1100
(207) 791-1350 Fax

Counsel for Petitioner
S.D. Warren Company

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the mere flow of the Presumpscot River through Warren's existing dams constitute a "discharge into" the Presumpscot River under section 401 of the Clean Water Act?

CORPORATE DISCLOSURE STATEMENT AND PARTIES BELOW

The parties to the appeal before the Maine Supreme Judicial Court (the "SJC") were Petitioner S.D. Warren Company ("Warren"), Respondent Maine Department of Environmental Protection (the "DEP"), and Intervenors (now Respondents according to Supreme Court Rule 12.6) American Rivers and Friends of the Presumpscot River.

Warren's petition for a writ of certiorari (the "Petition") contains Warren's corporate disclosure statement. Petition at ii.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT AND PARTIES BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	3
I. Background	3
II. Maine Agency Action	9
III. Maine Judicial Review	10
SUMMARY OF THE ARGUMENT	12
ARGUMENT:	
THE MERE FLOW OF THE PRESUMPSCOT RIVER THROUGH WARREN'S EXISTING DAMS DOES NOT CONSTITUTE A DISCHARGE INTO THE PRESUMPSCOT RIVER UNDER SECTION 401 OF THE CLEAN WATER ACT	14
I. The Plain Language Of The Statute Makes Clear That The Phrase "Discharge Into" Means An Addition From A Point Source Of Something To The Presumpscot River Other Than The Presumpscot River Itself	14

TABLE OF CONTENTS – Continued

Page

A. There Can Be No "Discharge" Under Section 401 When There Is No Addition To The River From A Point Source 15

B. The Flow Of The Presumpscot River Through Warren's Dams Is Not An "Addition" To The Presumpscot River 16

II. *Miccosukee* Supports The Conclusion That The Mere Flow Of A River Through A Dam Is Not A Discharge Of Anything Into The River 20

III. The EPA Has Opined That No "Addition" Occurs As A Result Of Water Passing Through A Dam 22

IV. Clean Water Act Section 304(f)(2)(F) Evidences That Congress Used Terms And Concepts Other Than "Discharge" To Describe The Mechanism Whereby Dams Can Affect Water Quality 23

V. Consideration Of Clean Water Act Section 511(c)(2) And The Legislative History Of Sections 401 And 402 Would Support Even A Narrower Reading Of Section 401 Than Is Necessary To Rule In Warren's Favor 25

A. The Language Used In Section 511(c)(2) To Preclude Duplicative And Inconsistent NEPA Review Of Activities Certified Under Section 401 Would Be Facially Inadequate If Section 401 Were Applicable When No Discharge Of A Pollutant Is Involved 26

TABLE OF CONTENTS – Continued

Page

B. The Legislative History Confirms That The Term "Discharge" As Used In Section 401 Cannot Be Read So Broadly As To Encompass The Flowing Of The Presumpscot River Into The Presumpscot River 29

CONCLUSION 34

APPENDIX A-1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

California v. Federal Energy Regulatory Commission, 495 U.S. 490 (1990) 8

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001) 21

Chickasaw Nation v. United States, 534 U.S. 84 (2001) 17

Oregon Natural Desert Association v. Dombeck, 172 F.3d 1092 (9th Cir. 1998) 24

Dubois v. Department of Agriculture, 102 F.3d 1273 (1st Cir. 1996) 17, 18

Engine Manufacturers Association v. South Coast Air Quality Management District, 541 U.S. 246 (2004) 14

First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946) 8

Gustafson v. Alloyd Co., 513 U.S. 561 (1995) 16, 21

Gutierrez v. Ada, 528 U.S. 250 (2000) 16

John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank, 510 U.S. 86 (1993) 28

Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369 (2004) 21

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 19

National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988) 18, 23, 25

TABLE OF AUTHORITIES – Continued

Page

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 18, 23, 25

North Carolina v. Federal Energy Regulatory Commission, 112 F.3d 1175 (D.C. Cir. 1997) 11, 15

Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189 (1985) 14

Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177 (1941) 17

PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994) 22

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 28

Rowland v. California Men's Colony, 506 U.S. 194 (1993) 17

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) 19

South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) .....*passim*

Taylor v. United States, 495 U.S. 575 (1990) 17

STATE CASES

S.D. Warren Co. v. Board of Environmental Protection, 2005 ME 27 .....*passim*

S.D. Warren Co. v. Maine Department of Environmental Protection, No. AP-03-70 (Me. Super. Ct., Cum. Cty., May 4, 2004) 1

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

16 U.S.C. § 797(e) 5, 6, 8
16 U.S.C. § 803(a) 6, 7
16 U.S.C. § 803(j) 7
16 U.S.C. § 811 7
16 U.S.C. § 817 5
16 U.S.C. § 821 8
28 U.S.C. § 1257(a) 1
33 U.S.C. §§ 1251 *et seq* 1
33 U.S.C. § 1311(a) 20
33 U.S.C. § 1314(f)(2)(F) 3, 24, 25
33 U.S.C. § 1341 ..... *passim*
33 U.S.C. § 1341(a)(1) 2
33 U.S.C. § 1342 ..... *passim*
33 U.S.C. § 1362(7) 2, 3
33 U.S.C. § 1362(12) ..... *passim*
33 U.S.C. § 1362(16) ..... *passim*
33 U.S.C. § 1371(c)(2) 3, 26, 27, 28
42 U.S.C. §§ 4321 *et seq* 13, 27

STATE STATUTES

ME. REV. STAT. ANN. tit. 5, § 11001(1) 1
ME. REV. STAT. ANN. tit. 5, § 11008(1) 1

TABLE OF AUTHORITIES – Continued

Page

RULES & REGULATIONS

18 C.F.R. § 4.34(b)(5)(i) 9

S. Ct. Rule 12.6 ii

LEGISLATIVE HISTORY

Federal Water Pollution Control Act (amended 1970) 29

Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) 32

H.R. 11896, 92d Cong. § 2 (1972) 30, 31, 32

House Consideration of the Report of the Conference Committee, October 4, 1972 ..... 27, 31

H.R. CONF. REP. NO. 99-507 (1986) 6, 8

H.R. CONF. REP. NO. 99-934 (1986) 6

S. REP. NO. 92-414 (1971) 24

S. 2770, 92d Cong. § 2 (1972) 29, 30, 32

Senate Consideration of the Report of the Conference Committee, October 4, 1972 27

AGENCY DOCUMENTS

FERC Order, 9 FERC ¶ 62,063 (Oct. 31, 1979) 5

FERC Order, 11 FERC ¶ 62,111 (May 14, 1980) 5

FERC Order, 11 FERC ¶ 62,150 (May 28, 1980) 5

TABLE OF AUTHORITIES – Continued

Page

FERC Order, 12 FERC ¶ 62,285 (Sept. 30, 1980)..... 5

FERC Order, 16 FERC ¶ 62,458 (Sept. 17, 1981)..... 5

Memorandum from Ann R. Klee, EPA General Counsel, and Benjamin H. Grumbles, EPA Asst. Administrator for Water, to Regional Administrators, regarding "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers" (Aug. 5, 2005), *available at* http://www.epa.gov/ogc/documents/water_transfers.pdf..... 12, 22, 23

OPINIONS AND ORDERS BELOW

The two unreported orders of Maine's DEP are reprinted in the Petition Appendix ("Pet. App."); the DEP Commissioner's initial certification order (the "Certification") is at Pet. App. A-74; and the Maine Board of Environmental Protection's order on appeal of the Certification is at Pet. App. A-35. The unreported Maine Superior Court's order, *S.D. Warren Co. v. Maine Department of Environmental Protection*, No. AP-03-70 (Me. Super. Ct., Cum. Cty., May 4, 2004), is reprinted in the Petition Appendix at A-19. The opinion of Maine's Supreme Judicial Court, sitting as the "Law Court," entered February 15, 2005, is reported at *S.D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27, and is reprinted in the Petition Appendix at A-1.

JURISDICTION

The SJC exercised jurisdiction over Warren's appeal pursuant to ME. REV. STAT. ANN. tit. 5, §§ 11001(1) and 11008(1) in order to decide, among other things, whether and to what extent the State of Maine was entitled to issue a certification affecting Warren's dams under 33 U.S.C. § 1341. The opinion of the SJC was entered on February 15, 2005. Warren filed the Petition on May 12, 2005; on October 11, 2005, this Court granted certiorari. This Court's jurisdiction rests upon 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS

At issue in this case is the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (the "Clean Water

Act"), in particular section 401, 33 U.S.C. § 1341, and pertinent statutory definitions contained in section 502(12) and (16), 33 U.S.C. § 1362(12) and (16).

Directly at issue is the first sentence of section 401(a)(1), which states as follows:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C. § 1341(a)(1).[1] The complete text of section 401 is reprinted in the Appendix to this brief.

Also at issue are the definitions contained in section 502(12) and (16), which state as follows:

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to the navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

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[1] "Navigable waters" are defined as the "waters of the United States" at section 502(7), 33 U.S.C. § 1362(7).

> The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

Id. § 1362(12) and (16).

Finally, also involved are Clean Water Act sections 304(f)(2)(F), 402, 502(7) and 511(c)(2), 33 U.S.C. §§ 1314(f)(2)(F), 1342, 1362(7) and 1371(c)(2), copies of all of which are provided in the Appendix to this brief.

STATEMENT OF THE CASE

I. Background

Warren owns and operates five hydroelectric generating dams on the Presumpscot River in Maine. Pet. App. A-2, A-19. All five of the dams were constructed in the early 1900s. Pet. App. A-2. These dams provide electricity to Warren's Westbrook paper mill. Pet. App. A-1. They previously generated approximately 40,500,000 kilowatt-hours of electricity annually, which is roughly the equivalent of 67,500 barrels of oil. Pet. App. A-118.

The dams are operated in run-of-river mode, meaning that the outflow of the projects is "approximately equal to inflow on an instantaneous basis. . . ." Pet. App. A-77. In the words of the SJC, "Warren is not adding more water to the river." A-8. Although they are not identical, all of Warren's dams operate in a generally similar fashion. *See* Joint Appendix ("J.A.") 11, 13-15, 17 (depicting each of Warren's hydropower projects). To generate power, water is channeled into the "power canal," past the turbines, and then back into the riverbed through the "tailrace channel." The water flowing through the power canal bypasses a

short section of the riverbed immediately below the dam. This section of the riverbed is the "bypass reach"; each of Warren's projects has such a bypass reach. Pet. App. A-75 to A-77. These bypass reaches receive the water not routed past the turbines. Pet. App. A-78.

Above each dam is an impoundment, a portion of the river through which the flow of water is slowed by the dam. Warren continually operates its dams, maintaining in each impoundment a relatively consistent water level that fluctuates no more than one foot under normal operating conditions.[2] Pet. App. A-78.

All parties agree that Warren's run-of-river dams do not add any pollutants to the Presumpscot River. In the DEP's words, "[n]one of the dams add 'pollutants' as that term is defined in section 502(6) of the Clean Water Act." DEP's Brief In Opposition To Petition For Certiorari at 3; *see also id. at* 9 n.6 (stating the "proposition that the dams in question do not discharge 'pollutants' [is] a proposition that [was] never contested in this case"). The dams nevertheless do affect the movement and flow of the Presumpscot River, in several instances causing less dissolved oxygen to be retained in the water, Petition Appendix A-51, and impacting habitat for aquatic organisms by limiting the flow of water in the bypass reach. Pet. App. A-78, A-89. The dams also change the nature of the river's recreational uses. *See, e.g.*, Pet. App. A-88 to A-89 (noting the impact of the dams on the river's fishery).

To operate the dams, Warren is required to obtain licenses from the Federal Energy Regulatory Commission

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[2] Hereinafter, Warren's hydropower projects, described in the paragraphs above, are referred to as Warren's dams.

("FERC"). 16 U.S.C. § 817. Warren previously obtained licenses for the five dams between 1979 and 1981. On each such occasion, the issue posed in this case did not arise because the State of Maine did not seek to issue a section 401 certification for these run-of-river dams. FERC Orders, 9 FERC ¶ 62,063 (Oct. 31, 1979); 11 FERC ¶ 62,111 (May 14, 1980); 11 FERC ¶ 62,150 (May 28, 1980); 12 FERC ¶ 62,285 (Sept. 30, 1980); 16 FERC ¶ 62,458 (Sept. 17, 1981) (licensing respectively: Saccarappa Project No. 2897, Mallison Falls Project No. 2932, Little Falls Project No. 2941, Gambo Project No. 2931, and Dundee Project No. 2942). Those licenses expired on January 26, 2001. Warren filed its application for relicensing with FERC on January 22, 1999.

FERC's authority to issue such licenses is found in section 4(e) of the Federal Power Act ("FPA"). 16 U.S.C. § 797(e). That section provides:

> The Commission is authorized and empowered –
>
> . . . .
>
> To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States,

> or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam. . . . In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purpose of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

Id.

The goal of section 4 "is to assure a true multiple use of water resources." H.R. CONF. REP. NO. 99-934, at 22 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2537, 2538. To this end, the law instructs FERC, as part of the licensing process, to consider "the applicant's plans for the improvement and broad, efficient and reliable utilization of the power potential of the waterway or waterways to which the project is related, together with other beneficial uses, including navigation, flood control, irrigation, recreation, water quality, and fish and wildlife. . . ." H.R. REP. NO. 99-507, at 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2496, 2521.

Section 10(a) of the FPA further provides that licenses issued by FERC must be subject to the condition:

> That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or

> benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

16 U.S.C. § 803(a)(1).

Section 18 of the FPA, 16 U.S.C. § 811, provides additional protection for fish. This section establishes that FERC "shall require the construction, maintenance, and operation by a licensee . . . of such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate." *Id.* § 811.

Finally, section 10(j) allows for broad input regarding environmental protection by requiring FERC to consider the recommendations furnished by federal and state environmental agencies regarding a project's impacts on fish and wildlife. *Id.* § 803(j). By requiring FERC to consider but not be bound by the input of environmental agencies, Congress "intended to stress the expertise of these agencies and the need for FERC to rely on them . . . without giving such agencies a veto or giving them mandatory authority such as provided in section 30(c) of the Act."

H.R. REP. No. 99-507, at 32 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3496, 2519.[3]

FERC's ability to balance the nation's energy needs and environmental considerations is subject to a major limitation imposed by the Clean Water Act. If the activity that FERC proposes to license may involve any discharge into the navigable waters, FERC may not grant a license unless the license applicant first obtains a certification or waiver from the state in which the discharge originates. 33 U.S.C. § 1341. The state that issues such a certification need not take into consideration the nation's energy needs

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[3] Section 27 of the FPA establishes the role of states in the licensing process. 16 U.S.C. § 821. This section provides:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested rights acquired therein.

Id.

Focusing largely on the language in sections 4(e) and 27 prior to the 1986 FPA amendments, the Court in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946), noted that the Federal Power Commission (the predecessor to FERC), save for the specific exceptions carved out in the FPA, is solely responsible for the licensing of hydropower projects. *Id.* at 168, 182. *First Iowa* then established that, in general, under the FPA the authority of the federal government supersedes that of state governments. *Id.* at 168. Section 27 saves some authority for the states, but the effect of that section "in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in *irrigation* or for *municipal* or *other uses of the same nature*." *Id.* at 175-76 (emphasis added).

Subsequent to the 1986 amendments, in *California v. FERC*, 495 U.S. 490 (1990), the Court reaffirmed its holding in *First Iowa* that the FPA grants FERC exclusive jurisdiction over hydropower project licensing.

and goals. *See id.* (identifying the scope of a state's certification authority and requiring evaluation only of environmental issues).

II. Maine Agency Action

FERC's rules and regulations require that "with regard to certification requirements for a license applicant under section 401(a)(1)," an applicant must file a copy of the water quality certification, a request for such certification, or evidence of waiver of such certification. 18 C.F.R. § 4.34(b)(5)(i). Warren filed a request for certification with Maine's DEP, and simultaneously took the position that the dams cause no discharge into the river within the meaning of section 401. The initial agency certification process lasted over four years. During the process, there was no suggestion that the dams add anything to the river. *See* Pet. App. A-87 to A-88, A-106 to A-110, A-120 to A-121.

The DEP Commissioner nevertheless issued a Certification imposing extensive restrictions on the operation of the facilities, resulting in a projected loss of energy equivalent to roughly one-seventh of the dams' electric generation (10,000 barrels of oil per year). Pet. App. A-118 to A-120. The restrictions included, among other things, conditions relating to water levels and flows, impoundment drawdowns and refill procedures, eel and fish passage, reaeration measures, and recreational facilities. Pet. App. A-121 to A-140 (containing the conditions of the Certification).

Warren appealed to Maine's Board of Environmental Protection. Warren argued, among other things, that the Certification was not warranted by section 401 because

the dams do not result in any discharge into the river. *See* Pet. App. A-118 to A-120 (comparing pre- and post-Certification power generation); Pet. App. A-38 to A-39 (reciting Warren's basis for its appeal).

The Board of Environmental Protection affirmed after *de novo* review. Pet. App. A-37 to A-38, A-73.

III. Maine Judicial Review

Warren then timely filed a petition for review in the Maine Superior Court. Warren argued, *inter alia*, that a river flowing through a dam does not in and of itself constitute a "discharge into" the river that triggers section 401 certification requirements. The Superior Court denied Warren's appeal. Pet. App. A-34.

Warren appealed to the SJC, which issued its decision denying Warren's appeal on February 15, 2005. The SJC, addressing the issue of whether water flowing through a dam constitutes a "discharge" under section 401, created an entirely new legal test and concluded that, based on that test, all water passing through a dam qualifies as a discharge. Pet. App. A-7 to A-8.

The SJC began its analysis by looking to the statutory language. The SJC stated:

> The term discharge is not expressly defined anywhere in the [Clean Water Act], however, section 502(16), 33 U.S.C.A. § 1362(16) (West 2001), provides that, "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." This statement of inclusion provides "the nearest evidence we have of definitional intent by Congress."

Pet. App. A-6 (citing *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997)). The statute defines the phrases "discharge of a pollutant" and "discharge of pollutants" as follows:

> (A) any *addition* of any pollutant to navigable waters from any point source,
>
> (B) any *addition* of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1362(12) (emphasis added). The SJC thus correctly reasoned that "[a]n 'addition' is the fundamental characteristic of any discharge." Pet. App. A-6.

In assessing whether water flowing through a dam constitutes an "addition" the SJC focused on whether the water is subject to "private control." Pet. App. A-7 to A-8. The SJC reasoned that the moment water passes through a dam it is subject to "private control" and thus temporarily loses its status as waters of the United States. Pet. App. A-7 to A-8. The "exiting" from the dam of this water that is presumed to have momentarily ceased being waters of the United States, reasoned the SJC, thus constituted an "addition" of non-U.S. waters to waters of the United States. Pet. App. A-8, A-10. Such an "addition," the SJC concluded, is a "discharge into" the river requiring water quality certification pursuant to section 401. Pet. App. A-7 to A-8.

SUMMARY OF THE ARGUMENT

Warren's argument begins with the language of the statute. Under section 401, certification is required only when an activity "may result in any discharge into navigable waters." Section 502(12) and (16), in turn, equate a "discharge" with "an addition . . . from a point source." On the facts of this case, the question framed by this language is whether a river flowing through a dam is an addition to the river from a point source.

The SJC erred in answering this question. The waters do not cease being navigable waters as they flow through the dams; and, in any event, any momentary change in the legal characterization of the river as it flows through the dam is not an addition of anything to the river.

This Court's recent decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), supports Warren's position. The Court in that case adopted the straightforward reasoning that polluted waters flowing into a reservoir from a canal add nothing to the navigable waters if the reservoir and canal are not meaningfully distinct water bodies. So, too, Warren's dams add nothing to the Presumpscot River. In the words of the U.S. Environmental Protection Agency ("EPA"), "no 'addition'" occurs merely as the result of "movement of water through a dam." Memorandum from Ann R. Klee, EPA General Counsel, and Benjamin H. Grumbles, EPA Asst. Administrator for Water, to Regional Administrators, regarding "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers," at 18 n.18 (Aug. 5, 2005), *available at* http://www.epa.gov/ogc/documents/water_transfers.pdf.

Section 304(f)(2)(F) further reinforces the conclusion that Warren's dams cannot be described as resulting in a discharge into the Presumpscot River within the meaning of section 401. In section 304(f)(2)(F) Congress addressed the effects that even clean, run-of-river dams might have on water quality. In so doing, Congress employed entirely different terminology than that used in section 401, expressly recognizing that such potential water quality effects result not from discharges into the river, but rather from changes in the movement and flow of the water.

Expanding the analysis to consider both the Clean Water Act as a whole, and Congress's efforts in drafting sections 401 and 402 in particular, strongly suggests that the foregoing conclusions are modest and likely understated. Section 511(c)(2) precludes redundant or inconsistent review under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"), of activities certified under section 401. The language Congress used in section 511(c)(2) to accomplish this result strongly suggests that Congress presumed that all section 401 certifications involved not only an addition to the water, but an addition of a pollutant. Congress's efforts in drafting sections 401 and 402 evidence the same presumption. To rule in favor of Warren, the Court nevertheless need not conclude that section 401 must be read as narrowly as context and history suggest. The point, instead, is that context and history provide no mandate for even trying to interpret the plain language more broadly than it appears, and certainly not so broadly as to make it apply to any and all activities that merely touch upon the navigable waters.

For all of these reasons, as more fully explained below, the flow of the Presumpscot River through Warren's dams does not constitute a discharge into the Presumpscot

River, and the SJC therefore erred in ruling that section 401 granted to the State of Maine the authority to issue the Certification.

ARGUMENT

THE MERE FLOW OF THE PRESUMPSCOT RIVER THROUGH WARREN'S EXISTING DAMS DOES NOT CONSTITUTE A DISCHARGE INTO THE PRESUMPSCOT RIVER UNDER SECTION 401 OF THE CLEAN WATER ACT.

I. The Plain Language Of The Statute Makes Clear That The Phrase "Discharge Into" Means An Addition From A Point Source Of Something To The Presumpscot River Other Than The Presumpscot River Itself.

In determining the scope of section 401, the starting point necessarily is the language of the statute itself. *See, e.g., Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("'Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'") (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). As explained below, the plain language of the statute, including the interlocking definitions supplied by Congress, makes clear that a "discharge into" the navigable waters under section 401 requires, at a minimum, the addition into the water from a point source of something other than the water itself.

A. There Can Be No "Discharge" Under Section 401 When There Is No Addition To The River From A Point Source.

Congress defined in section 502(16) the bare word "discharge." Section 502(16) states that the word "'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." Such a definition, by itself, is partially tautological, with the defined word "discharge" appearing on both sides of the verb "includes." In section 502(12), however, Congress further specified that the term "discharge of pollutants" means "any addition of any pollutant to the navigable waters from any point source." This definition makes clear, at least as a matter of plain language and logic, that Congress equated the notion of a "discharge" with the notion of "any addition . . . from any point source." In the words of the D.C. Circuit, "the nearest evidence we have of definitional intent by Congress reflects, as might be expected, that the word 'discharge' contemplates the addition . . . of a substance or substances." *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997); *see also id.* n.4 (noting that "if 'discharge of a pollutant' requires addition, then the inclusive understanding of 'discharge' also requires an addition").

This Congressional intent to equate "discharge" with "addition . . . from a point source" is further confirmed by the language of section 401 itself. The first sentence of section 401 apportions responsibility for certification among interstate water pollution control agencies based on which agency has "jurisdiction over the navigable waters at the point where the discharge originates or will originate. . . ." This language confirms that the "discharges" envisioned in section 401 were discharges from

point sources into the waters. In other words, the "from a point source" portion of the section 502(12) definition clearly carries over into section 401. There being nothing in the language to suggest otherwise, the "addition" portion therefore clearly carries over as well, so that a section 401 discharge is an "addition . . . from any point source."

B. The Flow Of The Presumpscot River Through Warren's Dams Is Not An "Addition" To The Presumpscot River.

The SJC did not disagree with any of the foregoing argument. To the contrary, the SJC expressly agreed that "[a]n addition is the fundamental characteristic of any discharge." Pet. App. 6. That agreement should have led to a ruling that Warren's dams cause no discharge at all because they add nothing to the Presumpscot River. Instead, the SJC opined, first, that the dams turn the river into non-U.S. waters, and then that the dams "add" those waters back to the river. The SJC then reasoned that, by using the word "includes" rather than "means," Congress did not intend to limit to pollutants the universe of what it is that need be added to the water to trigger section 401. Pet. App. A-9 to A-10. Therefore, adding "non-U.S. waters" to the "U.S. waters" was a "discharge into" the U.S. waters. This reasoning is thrice flawed.

First, as a matter of statutory construction, "a word is known by the company it keeps." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995); *see Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (discussing the "interpretive rule as familiar outside the law as it is within, for words and people are known by their companions"). By defining "discharge" as including a "discharge of a pollutant, and a discharge of pollutants," which in turn are defined as "any addition of any

pollutant," Congress associated a "discharge" with an "addition" into the water of a pollutant or at least something similar to a pollutant. The mere fact that the definition of "discharge" says that it "includes" a "discharge of a pollutant," instead of saying that it "means" a "discharge of a pollutant," does not give free rein to conclude that a "discharge" is the addition of anything at all, much less the water itself. *See, e.g., Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001) (holding that language following the term "including" in a statutory provision "is meant simply to be illustrative, hence redundant" of the scope of the statute's reach); *Phelps Dodge Corp. v. Nat'l Labor Relations Bd.*, 313 U.S. 177, 189 (1941) (holding that language following the phrase "including" in a statutory provision is intended to serve as an "illustrative application" of the statute's scope).

Second, section 401 uses not merely the word "discharge," but rather the term "discharge into." It stretches credulity to contend that Congress somehow envisioned a river flowing through a dam as a river "discharging into" itself. That the SJC's reading of the statute would compel such a contrived result means that its interpretation should be rejected. *See, e.g., Rowland v. California Men's Colony*, 506 U.S. 194, 200 (1993) (noting "the common mandate of statutory construction to avoid absurd results"); *Taylor v. United States*, 495 U.S. 575, 596 (1990) (rejecting party's "implausible interpretation of a statute").

Third, the SJC's conclusory statement that the Presumpscot River ceased being navigable waters, and thus no longer waters of the United States as it flowed through the dam, is simply wrong. The only support cited by the SJC for this statement is the 1996 First Circuit decision in *Dubois v. Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996). Pet. App. A-7 to A-8. *Dubois* held, among other things, that

a particular river and a particular pond were distinct water bodies, and that pumping polluted water uphill from the river to the pond through pipes was the discharge of a pollutant into the pond. 102 F.3d at 1299. The *Dubois* court further stated (without any cited authority) that when the river water was removed and piped uphill, it lost its status as waters of the United States. *Id.* at 1297-98.

Correct or not, the *Dubois* holdings cannot be relied on to imply that a dam or a pumping station on the same body of water could be said to be adding or discharging anything into the water merely by controlling the water. To the contrary, the *Dubois* court expressly distinguished the facilities before it from "a dam that merely accumulates the same water . . . or a pump storage facility that stores water from one source in a different place." *Id.* at 1299 (citing *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982); *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 589-90 (6th Cir. 1988)). The *Consumers Power* decision cited by the First Circuit in *Dubois* expressly held that water flowing through a pump storage, hydroelectric generation facility "never loses its status as water of the United States." *Consumers Power*, 862 F.2d at 589. The Sixth Circuit stated in *Consumers Power*: "[t]o the extent that no more has been shown than that unclean water flows out of the dam, Congress clearly displayed an intention to exempt dams from the Clean Water Act." *Id.* at 586.

In short, the SJC took an unnecessary and unsupported dictum from *Dubois*, and then applied it to the very situation that *Dubois* distinguished, in direct conflict with one of the cases on which *Dubois* relied as demonstrating a situation in which no "addition" occurred. In so doing, the SJC calls into question the reach of federal authority over the nation's waters. If the exercise of momentary control

over navigable waters caused the waters to cease being waters of the United States, stretches of water canals and controlled waterways throughout the country would lose their status as waters of the United States. That status is the lynchpin for the exercise of Congressional authority over those waters under the Commerce Clause. *See, e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979) (noting that this Court has used the term navigable waters "in delimiting the boundaries of Congress' regulatory authority under the Commerce Clause").

The SJC's view is also inconsistent with this Court's analysis in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). In that case the Court reaffirmed that the actual navigability of a water at every given moment is not determinative of whether a water qualifies as "navigable waters." *Id.* at 171-72. "The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the [Clean Water Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. Applying this reasoning, if a river is a navigable water in the absence of a dam, it does not lose its status as such as it momentarily flows through a dam.

Finally, the SJC's view ignores the fact that Warren's "control" of the river is not an assertion of ownership in even the simplest sense. Warren routes the river water through its dams pursuant to the express permission of the United States, as manifest in the FERC license granting such permission. There is nothing in that license suggesting that the waters somehow lose their status as waters of the United States. The SJC's conclusion to the contrary is simply a fictional construct that has no purpose

or significance other than serving as a basis for squeezing into the language of section 401 certain conduct that, on its face, is not encompassed by that language.

II. *Miccosukee* Supports The Conclusion That The Mere Flow Of A River Through A Dam Is Not A Discharge Of Anything Into The River.

The conclusions that a discharge into the river requires an addition of something to the river, and that temporarily controlling and uncontrolling the river is not an addition to the river, are directly supported by last year's decision in *Miccosukee*. *Miccosukee* concerned "a pumping facility that transfers water from a canal into a reservoir a short distance away." 541 U.S. at 98-99. The issue was whether "the pumping facility is required to obtain a discharge permit under" section 402 of the Clean Water Act. *Id.* at 99. Absent certain exceptions, the Clean Water Act requires such a discharge permit under section 402 for any facility that causes "the discharge of any pollutant." 33 U.S.C. § 1311(a). As noted above, the Clean Water Act defines "the discharge of any pollutant" to mean "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12).

The Court held that the pumping facility was a point source. *Miccosukee*, 541 U.S. at 105. There was no dispute that "phosphorous-laden water" flowed through that point source from the canal into the reservoir. *Id.* at 102. And it was clear that the owner of the pump exercised control over the water (by pumping it from the canal to the reservoir).

The Court nevertheless held that those facts were insufficient to establish that the facility pumping polluted

waters into the reservoir from the canal was causing a discharge into the navigable waters. Focusing on the definitional requirement that there must be "an addition" of pollutants to the navigable waters for there to be a "discharge" of pollutants, the Court concluded that the question whether a permit was required turned on whether the waters in the canal and the waters in the reservoir were "not meaningfully distinct water bodies." *Id.* at 112. Quoting the Second Circuit, the Court noted that "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* at 110 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2nd Cir. 2001)).

Miccosukee thus holds that merely taking control over water in a man-made facility to cause it to travel from one point to another is not an addition of anything to the water if the water at the entrance and the exit of the facility are not meaningfully distinct water bodies. *A fortiori*, causing the Presumpscot River to continue on its way to the ocean through a dam, turning a turbine as it passes, is not an activity that adds anything to the Presumpscot River. Just as the term "discharge" under section 402 requires an addition of something into the water to qualify as a discharge at all, so too is an addition required for there to be a discharge under section 401. *See, e.g.*, *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004) (holding that courts should avoid interpreting a statutory provision "in such a way as to give the familiar statutory language a meaning foreign to every other context in which it is used"); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 573 (1995) ("[W]e cannot accept the conclusion that this single operative word means one thing in one

section of the Act and something quite different in another.").[4]

III. The EPA Has Opined That No "Addition" Occurs As A Result Of Water Passing Through A Dam.

In the wake of *Miccosukee*, the EPA on August 5, 2005 issued a formal interpretation addressing the applicability of section 402 of the Clean Water Act to water transfers. Memorandum from Ann R. Klee, EPA General Counsel, and Benjamin H. Grumbles, EPA Asst. Administrator for Water, to Regional Administrators, regarding "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers" (Aug. 5, 2005) ("EPA Interp."), *available at* http://www.epa.gov/ogc/documents/water_transfers.pdf. The interpretation concluded that the permit requirements of section 402 are "generally inapplicable" to water transfers, or to dams that do not add pollutants to the water flowing through the dams. *Id.* at 9. With regard to dams, the EPA noted in particular that "the movement of water through a dam" does not require a permit both because it does not transfer water between two water bodies, *and* also "because no 'addition' has occurred." *Id.* at 18 n.18. As discussed above, the requirement that there be "an addition" is common to both section 402 and section 401.

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[4] *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 711 (1994), is not to the contrary. In that case, the Court simply observed that the proposed builder of a new dam conceded that the new dam would involve at least two possible discharges, including "the discharge of water at the end of the tailrace." The case did not present the issue of whether such a "discharge" is a discharge into the waters under section 401.

The EPA's conclusion regarding dams did not rest on the absence of pollutants going through dams. To the contrary, like the Court in *Miccosukee*, the EPA presumed the water flowing in and out of the dam to be polluted. Instead it focused on the fact that, polluted or not, the water was not added to the river by the dam. The EPA further cited with approval the opinion of the Sixth Circuit in *Consumers Power* and the D.C. Circuit's opinion in *Gorsuch* that "generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under the 'nonpoint source' category of pollution." *Id.* at 12 (quoting *Consumers Power*, 862 F.2d at 588) and 13 (characterizing the reasoning in *Gorsuch* and *Consumers Power* as reflective of the "better approach" for determining what constitutes an "addition"). The EPA was correct in finding that the flow of water through a dam involves no addition to the waters.

IV. Clean Water Act Section 304(f)(2)(F) Evidences That Congress Used Terms And Concepts Other Than "Discharge" To Describe The Mechanism Whereby Dams Can Affect Water Quality.

None of the foregoing is intended to deny that the operation of a dam affects a river. Depending on its operation, a dam can cause changes in the movement, flow, and circulation of a river. Such changes can cause a river to absorb less oxygen and to be less passable by boaters and fish. A dammed river, by definition, is not a wild river, and the Presumpscot River is not the same river it was before dams were added 250 years ago. *See, e.g.*, Pet. App. A-88 to

A-89 (comparing existing and historical fishery conditions on the Presumpscot River).

Nor was Congress oblivious to the fact that dams could affect rivers in ways that do not involve discharges into the river from a point source. Notwithstanding the 1972 legislative refocusing of the Clean Water Act on controlling point source pollution,[5] Congress was not silent on the matter of non-point source effects on water quality. In section 304(f)(2)(F) of the Clean Water Act, Congress required the EPA to consult with state and federal agencies and to issue "information including (1) guidelines for identifying and evaluating the nature and extent of non-point sources of pollution, and (2) processes, procedures, and methods to control pollution resulting from . . . changes in the movement, flow or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. § 1314(f)(2)(F).

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[5] The Water Pollution Control Act Amendments of 1972 reshaped federal water law and created the basic framework of the Clean Water Act that exists today. Replacing both the general structure and approach of the prior law, these amendments "replac[ed] water quality standards with point source effluent limitation." *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998). This change in focus emerged from the finding that as of 1971 "the Federal water pollution control program . . . has been inadequate in every respect." S. REP. NO. 92-414 (1971), at 7, *reprinted in* COMM. ON PUBLIC WORKS, 93D CONG., 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1699 (1973); *see also id.* at 69, *reprinted in* 2 LEG. HIST., at 1487 (noting that the Senate Bill that evolved into the 1972 amendments, S. 2770, changed the law's "emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants").

Both the D.C. Circuit and Sixth Circuit have found that section 304(f)(2)(F) is evidence that Congress intended to regulate water quality changes associated with dams through the implementation of non-point source controls. *Gorsuch*, 693 F.2d at 177; *Consumers Power*, 862 F.2d at 588. For present purposes, the simpler point is that section 304(f)(2)(F) shows that Congress did not attempt to use the term "discharge" in describing what it is that dams can do to water quality. Instead, Congress employed very different words and concepts ("changes in movement") when describing the effects of dams. Given this background, to equate a mere change in a river's movement with a "discharge into" the same river is simply too much.

V. Consideration Of Clean Water Act Section 511(c)(2) And The Legislative History Of Sections 401 And 402 Would Support Even A Narrower Reading Of Section 401 Than Is Necessary To Rule In Warren's Favor.

The foregoing examination of how the word "discharge" is used in the Clean Water Act, together with the reasoning adopted by this Court in *Miccosukee* and by the EPA in its official pronouncement, all lead to the conclusions that section 401 is inapplicable when nothing is added to the water from a point source, and that the mere flow of a river through a dam is not an addition of anything to the river. Those conclusions based on the language of the statute should be sufficient to warrant reversal of the SJC's decision. Simply put, to the extent that there is any ambiguity in the plain language of the

Clean Water Act that might otherwise be clarified by widening the scope of inquiry, there is no ambiguity on the basic points at issue here: There must be an addition of at least something to the river from a point source; and the river flowing through a dam is not the addition of anything.

That being said, Warren's position is fortified by considering how section 401 was understood by Congress in writing other sections of the Clean Water Act, and in the drafting of section 401 itself. While Warren need only establish that section 401 requires something more than the mere flow of a river through a dam in order for there to be a discharge into the river, Congress viewed section 401 even less broadly, and as requiring the addition of a pollutant from a point source in order for there to be a discharge into the river.

A. The Language Used In Section 511(c)(2) To Preclude Duplicative And Inconsistent NEPA Review Of Activities Certified Under Section 401 Would Be Facially Inadequate If Section 401 Were Applicable When No Discharge Of A Pollutant Is Involved.

Clean Water Act section 511(c)(2), 33 U.S.C. § 1371(c)(2), evinces that Congress presumed that all activities certified under section 401 would in fact involve the discharge of pollutants. Section 511(c)(2) provides:

> Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to – (a) authorize any federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant

> to this chapter or the adequacy of any certification under Section 1341 of this title; or (b) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

The purpose of section 511(c)(2) is to prevent duplicative, and potentially inconsistent, review under NEPA of activities that have already been permitted or certified under sections 401 and 402.[6] *House Consideration of the Report of the Conference Committee, October 4, 1972* ("*H.R. Consid. of Conf. Rpt.*") (statement of Congressman Jones), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 236 (1973) ("1 LEG. HIST.") (stating that "[s]ection 511(c)(2) is intended to obviate the need for other Federal agencies to duplicate the determinations of the States and EPA as to water quality considerations"); *see also Senate Consideration of the Report of the Conference Committee, October 4, 1972, reprinted in* 1 LEG. HIST., at 183 (noting that other Federal agencies "shall accept as dispositive the determinations of EPA and the States (under section 401 and its predecessor, section 21(b) of the [Federal Water Pollution Control Act] prior to the 1972 amendments)").

If section 401 is interpreted to be inapplicable when the federally licensed activity involves no discharge of a pollutant, then the language Congress used in section 511(c)(2) achieves the stated purpose: NEPA review of the

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[6] NEPA directs the federal government to integrate environmental values into their decision-making process by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. 42 U.S.C. §§ 4321 *et seq.*

adequacy of section 401 certifications is precluded. If, however, section 401 is interpreted to require certifications even of activities that will not result in a discharge of a pollutant, then section 511(c)(2) would fall peculiarly and inexplicably short of achieving its purpose. It would preclude duplicative and inconsistent NEPA review of certifications involving the discharge of pollutants, yet allow such duplicative and inconsistent review when something other than a pollutant, and presumably less harmful, is added to the water.

In sum, section 511(c)(2) offers an answer to the question of what must be added to a river in order for there to be a "discharge" under section 401. The answer is that, notwithstanding the use of the term "includes" in defining discharges, Congress presumed that discharges under section 401 would necessarily include the addition of pollutants. *See, e.g., Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (in construing statutes, courts should look to "the broader context of the statute as a whole"); *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 94 (1993) (statutory language should be interpreted consonant with "the provisions of the whole law") (internal quotation marks omitted). Whether or not this Court were ultimately so to conclude, the fact that there is substantial evidence to suggest that section 401 discharges are no more than discharges of a pollutant or pollutants renders it entirely unreasonable to go so far in the other direction as to find that the flowing of a river through a dam is, in and of itself, a discharge into the river under section 401.

B. The Legislative History Confirms That The Term "Discharge" As Used In Section 401 Cannot Be Read So Broadly As To Encompass The Flowing Of The Presumpscot River Into The Presumpscot River.

The legislative history of sections 401 and 402 suggests an explanation for why Congress used the word "includes" in defining "discharge" even though it otherwise appears that Congress conceived of all discharges as involving the discharge of pollutants. The original Senate Bill in 1972 setting forth what became sections 401 and 402 employed in section 401 the term "discharge" precisely as it appears in the statute as enacted:

> Any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State. . . .

S. 2770, 92d Cong. § 2 (1972) (proposing section 401(a)(1)), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1679 (1973) ("2 LEG. HIST."). This language was the same language that had appeared in section 21(b) of the prior law. Federal Water Pollution Control Act, § 21(b)(1) (amended 1970), *reprinted in* HOUSE COMM. ON PUB. WORKS, LAWS OF THE UNITED STATES RELATING TO WATER POLLUTION CONTROL AND ENVIRONMENTAL QUALITY 47-48 (1970).

Section 402 in the Senate Bill, in turn, granted the EPA the ability to issue NPDES permits "for the discharge of any pollutant, or combination of pollutants, into the navigable waters. . . ." S. 2770, 92d Cong. § 2 (proposing

section 402), *reprinted in* 2 LEG. HIST., at 1685. Thus, the Senate Bill contained the same use of different language in sections 401 and 402 that is in the statute as enacted and from which the reader infers different meanings.

At the same time, though, the Senate Bill made clear that no difference in meaning was intended. The Bill did this by defining "discharge" as follows:

> The term 'discharge' means (1) any addition of any pollutant to navigable waters from any point source, (2) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft, or (3) any addition of any pollution to publicly owned treatment works (as defined in section 210 of this Act) by any industrial user (as defined in section 210 of this Act).

Id. (proposing section 502(n)), *reprinted in* 2 LEG. HIST., at 1699.

In short, notwithstanding the use of "discharge" in section 401 and "discharge of pollutants" in section 402, the Senate Bill made clear that the former simply encompasses two forms of the latter (plus the discharge of pollution into publicly owned treatment works).

Several months later, the House responded with an alternative. A principal thrust of the competing House Bill was to provide a different permitting scheme for a form of heat pollutant that the House Bill defined as "thermal discharge." Specifically, the House Bill created a definition of "thermal discharge." H.R. 11896, 92d Cong. § 2(1972) (proposing section 502(17)), *reprinted in* 1 LEG. HIST., at 1043-45. Through this special treatment of the permitting

of thermal discharges, the House intended to allow for less stringent regulation of such discharges. *See id.* (proposing section 316, which provided for development of regulations specific to thermal discharges), *reprinted in* 1 LEG. HIST., at 1043-49; *H.R. Consid. of Conf. Rpt.* (statement of Congressman Clark noting that section 316 in the House Bill "recognizes that heat is less harmful than most 'pollutants' and that consideration should be given to the dissipative capacities of the receiving waters"), *reprinted in* 1 LEG. HIST., at 273.

While creating a different permitting approach for thermal discharges than the discharge of other pollutants under section 402, the House did not seek to exclude thermal discharges from the certification requirements of section 401. To achieve this result, the House Bill proposed the following two part approach to defining discharges and discharges of pollutants:

> The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutants to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.
>
> . . . .

> The term 'discharge' when used without qualification includes a discharge of a pollutant, a discharge of pollutants, and a thermal discharge.

H.R. 11896, § 2 (proposing sections 502(13), 502(18)), *reprinted in* 1 LEG. HIST., at 1069-71.[7]

Fairly read, the competing House Bill proposed to narrow the reach of section 402 in the Senate Bill by eliminating reference to publicly owned treatment works and by softening section 402 permitting requirements for thermal discharges. The House's proposed definition of "discharge" simply made clear that "thermal discharges" were not to be excluded from section 401. There is certainly no evidence that the House Bill sought to broaden the ambit of the Senate Bill so that it addressed activities not addressed in the Senate draft, other than activities resulting in thermal discharges.

The final language that emerged from conference eliminated reference to publicly owned treatment works, retained the House's definition of "discharge of a pollutant," but modified its definition of "discharge" to eliminate reference to "thermal discharges," reflected as follows:

> The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants~~, and a thermal discharge~~.

Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 502(16), 86 Stat. 816, 887 (1972)

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[7] In both S. 2770 and H.R. 11896 the term "pollutant" was defined as "not limited to" dredged spoil, solid waste, heat, etc. S. 2770, § 2 (proposing section 502(f)), *reprinted in* 2 LEG. HIST., at 1697; H.R. 11896, § 2 (proposing section 502(6)), *reprinted in* 1 LEG. HIST., at 1068.

(codified as 33 U.S.C. 1362(16) (stricken language reflects language deleted from House Bill).

In light of this drafting history, it would be reasonable to conclude that the present definition of "discharge" is not intended to imply any materially greater scope for section 401 than for section 402. The definition was initially drafted simply to reflect that the House proposed separate treatment for thermal discharges than for discharges of pollutants under the section 402 permitting scheme. Hence it created a definition of "discharge" that would preserve that proposed distinction. When that distinction was dropped, the conferees simply struck "thermal discharge" from the definition. To argue now that these partially successful efforts by the House to narrow the scope of section 402 in the Senate Bill somehow were intended to substantially *widen* the scope of section 401 finds no support in this history. The pertinent language of section 401 itself as contained in both Bills never changed, and no one suggested that either the House or the Senate envisioned any broader regulatory mandate than that federal agencies may not license discharges of pollutants into the navigable waters without state certification.

For present purposes, though, the point is not that section 401 should be limited to discharges of pollutants in order to comport with this drafting history. Rather, the simpler point is that, however one parses this history, one certainly finds no support for reading the term "discharge into" so broadly as to include an activity that adds nothing at all to the waters.

CONCLUSION

The Clean Water Act unambiguously requires, at the very least, that something be added into the navigable waters from a point source before one can begin to say that there is any discharge into the waters under section 401. The language of the statute does not specify with equal clarity what it is that needs to be added to the waters in order to have a discharge into the waters. Canons of statutory interpretation counsel that the substance added must be something like a pollutant, although the use of the word "includes" in the definition of "discharge" implies that what must be added need not actually be a pollutant. But the legislative history and the language of section 511(c)(2) suggest the contrary, indicating that Congress actually presumed that it would be a pollutant.

What is nevertheless clear, though, is that the mere flow of the river itself through the dam does not constitute a discharge into the river of anything at all. For this simple reason alone, the decision of the SJC should be reversed.

Respectfully submitted,

WILLIAM J. KAYATTA, JR.
MATTHEW D. MANAHAN
(Counsel of Record)
NICHOLAS D. LIVESAY
PIERCE ATWOOD LLP
One Monument Square
Portland, ME 04101
(207) 791-1100

Counsel for Petitioner
S.D. Warren Company

APPENDIX:
STATUTORY PROVISIONS INVOLVED

Clean Water Act

33 U.S.C. § 1314. Information and guidelines

. . . .

(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including

(1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and

(2) processes, procedures, and methods to control pollution resulting from –

(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;

(B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;

(C) all construction activity, including runoff from the facilities resulting from such construction;

(D) the disposal of pollutants in wells or in subsurface excavations;

(E) salt water intrusion resulting from reductions of fresh water flow from any cause, including extraction of ground water, irrigation, obstruction, and diversion; and

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Such information and revisions thereof shall be published in the Federal Register and otherwise made available to the public.

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33 U.S.C. § 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b)

and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of

such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the

applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in

(A) the construction or operation of the facility,

(B) the characteristics of the waters into which such discharge is made,

(C) the water quality criteria applicable to such waters or

(D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of

assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or

permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

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33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either

(A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or

(B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator

determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of

such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which –

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)

(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by

each such source, in addition to adequate notice to the permitting agency of

(A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants,

(B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or

(C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this

section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals. – A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of –

> (A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue

(A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or

(B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of

this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

(e) Waiver of notification requirement

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

Any permit issued under this section for the discharge of pollutants into the navigable waters from a

vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(j) Public information

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of

(1) section 1311, 1316, or 1342 of this title, or

(2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement

(1) Agricultural return flows

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor

shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(m) Additional pretreatment of conventional pollutants not required

To the extent a treatment works (as defined in section 1292 of this title) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 1314(a)(4) of this title into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 1317(b)(1) of this title. Nothing in this subsection shall affect the Administrator's

authority under sections 1317 and 1319 of this title, affect State and local authority under sections 1317(b)(4) and 1370 of this title, relieve such treatment works of its obligations to meet requirements established under this chapter, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program

(1) State submission

The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage

A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b) of this section.

(3) Approval of major category partial permit programs

The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if –

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and

identifiable part of the State program required by subsection (b) of this section.

(4) Approval of major component partial permit programs

The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) of this section if –

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section; and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) of this section by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding

(1) General prohibition

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314(b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations

established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title.

(2) Exceptions

A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if –

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)

(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B) of this section;

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 1311(c), 1311(g), 1311(h), 1311(i), 1311(k), 1311(n), or 1326(a) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

(3) Limitations

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which

is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers –

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of –

(A) identifying those stormwater discharges or classes of stormwater discharges

for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum,

(A) establish priorities,

(B) establish requirements for State stormwater management programs, and

(C) establish expeditious deadlines. The program may include performance standards,

guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows

(1) Requirement for permits, orders, and decrees

Each permit, order, or decree issued pursuant to this chapter after December 21, 2000, for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").

(2) Water quality and designated use review guidance

Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report

Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

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33 U.S.C. § 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

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(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

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33 U.S.C. § 1371. Authority under other laws and regulations

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(c) Action of the Administrator deemed major Federal action; construction of the National Environmental Policy Act of 1969

(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852) [42 U.S.C. 4321 et seq.]; and

(2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to –

(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title; or

(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

. . . .

No. 04-1527

FILED
JAN 5 - 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE BOARD OF ENVIRONMENTAL PROTECTION, *et al.*,

Respondents.

On Writ Of Certiorari To The Maine Supreme Judicial Court

BRIEF FOR RESPONDENTS AMERICAN RIVERS AND FRIENDS OF THE PRESUMPSCOT RIVER

SEAN MAHONEY
VERRILL DANA, LLP
One Portland Square
Portland, ME 04112

RONALD A. KREISMAN
25 Page Street
Hallowell, ME 04347

RONALD A. SHEMS
SHEMS DUNKIEL KASSEL & SAUNDERS PLLC
91 College Street
Burlington, VT 05401

RICHARD J. LAZARUS*
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9129

DANIEL H. SQUIRE
ETHAN G. SHENKMAN
ROBERT A. MAYS
WILMER CUTLER PICKERING HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037

Counsel for Respondents

**Counsel of Record*

QUESTION PRESENTED

Whether hydroelectric facilities, which impound and divert water from a navigable water body and then channel and release that water through their facilities into the same water body downstream, result in "any discharge into the navigable waters," within the meaning of Section 401 of the Clean Water Act, 33 U.S.C. § 1341.

TABLE OF CONTENTS

Page

Question Presented i

Statement 3

Introduction and Summary of Argument 13

Argument 16

I. The Diversion and Release of Waters into the Presumpscot River by Petitioner's Hydroelectric Facilities Are "Discharges" into Navigable Waters within the Plain Meaning of Section 401 19

II. None of Petitioner's Arguments in Support of Its Claim that Its Hydroelectric Facilities Do Not Result In Discharges into Navigable Waters Has Merit 21

A. Section 401 Requires "Any Discharge" into Navigable Waters and Not an "Addition" to Navigable Waters 22

B. Petitioner's Reliance on the Statutory Requirement that the Discharges Be "Into" Navigable Waters and on this Court's Decision in *Miccosukee* Is Misplaced 25

C. Petitioner's Characterization of a Hydroelectric Facility as "Mere Flow of a River Through a Dam" Ignores the Undisputed Fact that Its Facilities Cause Violations of State Water Quality Standards 28

D. In All Events, Petitioner's Discharge of Waters Downstream Would Amount to an "Addition" 30

III. The Plain Meaning of "Discharge" in Section 401 Is Confirmed By the Purpose, Structure, and Legislative History of the Clean Water Act 32
A. Congress Intended to Give States Primary Authority to Ensure Compliance with State Water Quality Standards 33
B. Section 401's Legislative History Confirms that "Any Discharge" Includes the Release of Water from Hydropower Facilities Without a Showing of an "Addition of Any Pollutants" 40
IV. Longstanding and Settled Administrative Construction of Section 401 and the Reasonable Reliance on that Construction Further Support the View that Hydropower Facilities Result in "Discharges" Within the Plain Meaning of Section 401 43
A. The Federal Government Has Consistently Interpreted Section 401 as Requiring State Certification for the Licensing and Relicensing of Hydroelectric Facilities 44
B. The Reliance Interests Created by Section 401's Plain Meaning Underscore the Illegitimacy of Petitioner's Request for Relief Securable only from Congress and not from the Courts 49

Conclusion 50

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33 U.S.C. § 1251(b) 35
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33 U.S.C. § 1312 42
33 U.S.C. § 1313 ..... 4, 6, 11, 36
33 U.S.C. § 1313(a) 4
33 U.S.C. § 1313(c) 5, 10
33 U.S.C. § 1314(a) 4, 6, 35
33 U.S.C. § 1314(b) 4
33 U.S.C. § 1314(f)(2) 36
33 U.S.C. § 1316 42
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33 U.S.C. § 1321(a)(2) 20
33 U.S.C. § 1322 20
33 U.S.C. § 1341 ..... *passim*
33 U.S.C. § 1341(a) 6, 34
33 U.S.C. § 1341(d) 6
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33 U.S.C. § 1362(1)-(23) 23
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MAINE BOARD OF
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Brief for the Respondents American Rivers and Friends of the Presumpscot River

This case is steeped in American history. The water body at issue in the case, the Presumpscot River, is reflected in the writings of the great American poet Henry Wadsworth Longfellow, whose family had deep roots in Maine, especially in Gorham, near the river's banks.[1] The

[1] Robert Stafford Ward, *Longfellow's Roots in Yankee Soil*, 41 The New England Q. 180, 181 (1968). Part of Longfellow's poem "*An April Day*," which he wrote when he was 17, has long been considered evocative of the Presumpscot River: "*Inverted in the tide Stand the gray rocks, and trembling shadows throw. And the fair trees look over, side by side, And see themselves below.*" *See Inverted in the Tide*, Postcard (1900-1910) (held by Brown Univ., Providence, R.I.) (displaying a reproduction of a photograph of the Presumpscot River and a four-line passage from "An April Day" by Longfellow).

petitioner, S.D. Warren Co., was founded by Samuel D. Warren a few years after he and his brother Otis purchased their first mill in 1847. His son, Samuel D. Warren, Jr., became a close friend, law school classmate, and law partner of Louis Brandeis, with whom he co-authored one of the nation's most celebrated law review articles.[2] The modern-day controversy underlying this case is no less expressive of the country's history. The case is simply the most recent in a long line of controversies before this Court arising out of conflicts between public rights and private interests in navigable waters. *See, e.g., Gibbons v. Ogden*, 22 U.S. 1 (1824); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Missouri v. Illinois*, 200 U.S. 496 (1906).

The precise legal issue presented is whether Congress authorized the States to require compliance with State water quality standards under Section 401 of the Clean Water Act, 33 U.S.C. § 1341. For more than 100 years, petitioner has operated its hydroelectric facilities on the Presumpscot River with little regard for the adverse impact on water quality. Dammed from stem to stern, the river has witnessed a profound decline in water quality and the consequent extirpation of its once prodigious sea-run fishery.

Petitioner claims the right to continue to operate its facilities for the next forty years in violation of State water quality standards. Because respondents American Rivers and Friends of the Presumpscot River agree with Maine that the plain meaning of Section 401 of the Clean Water Act authorizes the State to require petitioner's compliance with Maine water quality standards, we join Maine in urging the Court to affirm the lower court's judgment.

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[2] Samuel D. Warren, Jr. and Louis Brandeis formed the Boston law firm of Warren & Brandeis and co-authored *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). *See generally* Charles White Huntington, *The Warren-Clarke Genealogy: A Record of Persons Related within the Sixth Degree to the Children of Samuel Dennis Warren and Susan Cornelia Jackson* 169 (1894); Lewis J. Paper, *Brandeis* 21 (1983); The Westbrook History 2000 Committee & Dianne LeConte, *Westbrook on the Presumpscot* i (Arcadia 2000).

Statement

This case concerns the meaning of Section 401 of the Clean Water Act, 33 U.S.C. § 1341. Petitioner owns and operates five hydroelectric facilities along the Presumpscot River in the State of Maine pursuant to federal licenses issued by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act, 16 U.S.C. § 797(e). This Court granted review limited to the threshold jurisdictional question whether Section 401 applies to petitioner's facilities.

I. The Clean Water Act and Section 401

"Congress passed the Clean Water Act for the stated purpose of 'restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters.' 33 U.S.C. § 1251(a)." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67 (2001) (*SWANCC*); *Public Utility Dist. No. 1 v. Washington Dep't of Ecology (PUD No. 1)*, 511 U.S. 700, 714 (1994). "The 'major purpose' of the [Act] was 'to establish a *comprehensive* long-range policy for the elimination of water pollution.'" *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981) (emphasis in original) (quoting S. Rep. No. 92-414, 92d Cong.,1st Sess. 95 (1971)).

Prior to 1972, federal water pollution control legislation generally addressed water pollution by promoting the adoption and implementation by the States of enforceable water quality standards. *See EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 202-05 (1976). Because, however, a program "based on water quality standards * * * proved ineffective" (*id.* at 202) standing alone, Congress in 1972 comprehensively amended the federal law to blend two different approaches: a permit program designed to reduce discharges of pollutants based on a series of technology-based effluent reduction limitations promulgated by the U.S. Environmental Protection Agency and a significantly enhanced program

of State water quality standards adopted and administered by the States. *See id.* at 204-08; *Milwaukee v. Illinois*, 451 U.S. at 310-11; *compare, e.g., EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 69 (1980) (technology-based effluent limitations) *with Arkansas v. Oklahoma*, 503 U.S. 91, 101-102 (1992) (water quality standards).

1. Technology-Based Effluent Limitations. Sections 301 and 304(b) of the Clean Water Act, 33 U.S.C. §§ 1311, 1314(b), govern EPA's promulgation of a series of nationally uniform technology-based effluent limitations applicable to categories of point source dischargers of pollutants into the nation's navigable waters. These effluent limitations "translate[] Congress' broad goal of eliminating 'the discharge of pollutants into the navigable waters,' 33 U. S. C. § 1251 (a)(1), into specific requirements that must be met by individual point sources." *Nat'l Crushed Stone Ass'n*, 449 U.S. at 69. Sections 301(a) and 402, 33 U.S.C. §§ 1313(a), 1342, ensure implementation of the effluent limitations. Section 301(a) provides that "it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit" (*Milwaukee v. Illinois*, 451 U.S. at 310-11) and Section 402 establishes the National Pollutant Discharge Elimination System (NPDES) permit program that "impose[s] limitations on the discharge of pollutants" at least as stringent as those mandated by the technology-based effluent limitations. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 174 (2000).

2. Water Quality Standards. Sections 303 and 304(a) of the Clean Water Act, 33 U.S.C. §§ 1313, 1314(a), establish the framework for State adoption and implementation of State water quality standards. "[T]he achievement of state water quality standards [i]s one of the Act's central objectives." *Arkansas v. Oklahoma*, 503 U.S. at 106. "Section 303 * * * requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters." *PUD No. 1*, 511 U.S. at 704. Section 303(c)(2)(A) further provides that the standards established by each State shall "protect the public health or welfare, enhance the quality

of water, and serve the purposes of this Act" and "shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial, and other purposes * * *." 33 U.S.C. § 1313(c)(2)(A). "Under the [Act], a water quality standard must 'consist of the designated uses of the navigable waters involved *and* the water quality criteria for such waters based upon such uses.'" *PUD No. 1*, 511 U.S. at 714 (emphasis in original) (quoting 33 U.S.C. § 1313(c)(2)(A)).

3. Cooperative Federalism. "To achieve these ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State Governments" (*PUD No. 1*, 511 U.S. at 704), amounting to "a partnership between the States and the Federal Government, animated by a shared objective * * *." *Arkansas v. Oklahoma*, 503 U.S. at 101. EPA promulgates the technology-based effluent limitations applicable to point source dischargers of pollutants and administers the Section 402 NPDES permit program, while providing States with the option under the Act of administering the permit program themselves, subject to federal oversight. *See* 33 U.S.C. § 1342(b)-(d); *Arkansas v. Oklahoma*, 503 U.S. at 102 & n.7. And, while the States are primarily responsible under the Act for promulgating their own State water quality standards in the first instance, "EPA provides States with substantial guidance in the drafting of water quality standards," reviews initial State standards for consistency with the Clean Water Act, and requires "that state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards." *Arkansas v. Oklahoma*, 503 U.S. at 101 (citing 33 U.S.C. § 1313(c)).

Congress made clear, however, that the Federal-State "partnership" is not equal in all respects, at least in terms of each State's ability to protect water quality within its borders. As recently described by this Court, "Congress chose to 'recognize, preserve, and protect the *primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use

(including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.'" *SWANCC*, 531 U.S. at 166-67 (quoting 33 U.S.C. § 1251(b)) (emphasis supplied). To that end, nothing in Sections 303 or 304(a) authorizes EPA to reject a water quality standard proffered by a State for being unduly stringent, but instead only for being not sufficiently stringent. *See* 33 U.S.C. §§ 1313, 1314(a). And, Section 510 of the Act expressly preserves State authority to impose a more stringent "standard or limitation respecting discharges of pollutants" or "any requirement respecting control or abatement of pollution," while broadly declaring that "nothing in the [Act] shall * * * be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." *Id.* § 1370.

4. Section 401. Section 401 reflects both the Federal-State partnership within the Clean Water Act and the separate roles served by those provisions aimed at reducing discharges of pollutants through the imposition of effluent limitations and those more broadly aimed at curbing water pollution as necessary to meet State water quality standards. In particular, Section 401 authorizes the States to ensure that any federally licensed or permitted activities that "may result in any discharge into the navigable waters" shall comply with any State water quality requirements, as well as with any other applicable requirements of the Act, including any technology-based effluent limitations on pollutants.

This authority derives from Sections 401(a) and 401(d). 33 U.S.C. § 1341(a)&(d). Section 401(a) requires the applicant for a "Federal license or permit" to provide the federal "licensing or permitting agency a certification from the State * * * that any such discharge will comply with applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title." *Id.* § 1341(a). As described by this Court, Section 401(d) "provides that any certification shall set forth 'any effluent limitations and other limitations * *

* necessary to assure that *any applicant*' will comply with various provisions of the Act and appropriate state law requirements." *PUD No. 1*, 511 U.S. at 711 (emphasis in original) (quoting 33 U.S.C. § 1341(d)). The Court has further held that "state water quality standards adopted pursuant to § 303 are among the 'other limitations' with which a State may ensure compliance through the § 401 certification process." *Id.* at 713 (quoting 33 U.S.C. § 1341(d)).

II. The Presumpscot River and S.D Warren's Hydroelectric Facilities

Stretching 25 miles from the outlet of Sebago Lake to Casco Bay just north of Portland, Maine, the Presumpscot River was once a fast moving water containing numerous falls throughout its length. Indeed, "Presumpscot" is a Native American name literally meaning "many shallow rivers," or, as described by one Native American leader "rough places river." *See* Charles S. Fobes, *The Story of the Presumpscot*, 5 *Collections and Proceedings of the Maine Historical Society* 363 (2d series 1894); Fannie Hardy Eckstrom, *Indian Place Names of the Penobscot Valley and the Maine Coast* 159 (Maine Studies No. 55, Univ. Maine 1974). The river historically contained a large and self-sustaining fishery, including populations of various anadromous fish species, including Atlantic salmon, American shad, river herring, rainbow smelt and striped bass. Pet. App. A89.

Starting sporadically in the mid-1600s and then accelerating during the mid-1700s, settlers moving inland and upriver from coastal villages erected a series of mills and mill dams throughout the rapidly-falling river. *See* William Willis, *The History of Portland*, 69-70 (1831); Fobes, *The Story of the Presumpscot*, *supra*, at 370-80; *Westbrook on the Presumpscot*, *supra*, at i. As the number of mill dams increased, the impact of these dams on the anadromous fish was significant. As early as 1776, towns filed petitions with the colonial legislature, complaining about the

adverse impacts of the dams on fishing.[3]

Samuel D. Warren purchased his first paper mill along the Presumpscot River in 1847, forming the petitioner S.D. Warren company soon thereafter. By 1880, he had expanded mill operations along the river to create the largest paper mill in the world. *See Westbrook on the Presumpscot, supra,* at i; Charles E. Clark, *Maine - A Bicentennial History* 136-37 (1977). The ensuing expansion and stabilization of dams on the Presumpscot River fundamentally transformed the water body. What had once been a fast-flowing, continuous, biologically productive body of water became a river formally divided into distinct, isolated zones behind eight dams, seven of which petitioner owns and operates. As described by the Maine Department of Environmental Protection, "all anadromous fish were extirpated from the river by the construction of dams that blocked passage and by pollution." Pet. App. A89.

This case concerns five of petitioner's dams: the Saccarappa, Mallison Falls, Little Falls, Gambo, and Dundee hydroelectric facilities. *See* J.A. 9 (Map of Presumpscot River Projects). Each of petitioner's hydroelectric facilities, like hydroelectric facilities in general, use the gravitational force of water as it moves down a stream from an upper elevation to a lower elevation to drive a mechanical turbine that spins a

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[3] *See, e.g.*, Commissioners of Fisheries of the State of Maine, *First Report - 1867*, 35-37, 72-74 (1869); *The Petition of the Towns of Cape Elizabeth, Windham, Gorham, and Pearsontown in the County of Cumberland Humbly Shew* (Aug. 22, 1776) ("Mill Dams have been erected on the said River the passage of all kinds of Fish * * * has been totally obstructed & stopt in their course up said River to the great prejudice of many back Town."), *reproduced at* Maine Sup. Jud. Ct. Rec. App. vol. I, at 255-56 ; *The Petition of Joseph Wefton, and others, in Behalf of the Inhabitants of Cape-Elizabeth, Scarborough, Gorham, and Raymond-Town*, praying that an Act may pass to prevent the Obftruction of Fish in their Paſſage thro' Pefumpfcot-River and Alewive-Brook, *Votes of the Honorable House of Representatives, Tuesday, June 4, 1771, reprinted in* Journals of the House of Representatives of Massachusetts, 17, 19-20 (Mass. Historical Soc'y 1979).

generator, and thereby produces electricity.[4] Hydropower projects are classified by the nature of their operations, including pondage, storage, reregulating, pumped back storage, and run-of-the-river. Petitioner's five facilities are operated in a run-of-the-river mode, in which total water releases downstream are matched as closely as possible to total inflow to the project upriver on an "instantaneous basis." Pet. App. A19. Each facility first impounds the water upstream. The facility then diverts most of the water through a "power canal" and then turbines to generate electricity. After the turbines, the water is diverted into a "tailrace channel" from which the water is conveyed back into the river. *Id.* at A74-A78.[5]

Immediately downstream from each facility's impoundment is a section of the river referred to as a "bypass reach" because this is the portion of the river that is literally "bypassed" when the impounded water is diverted instead through the power canal, turbines, and tailrace channel. Petitioner's bypass reaches range from 300 feet to one-fifth of a mile in length and have historically contained very little (and sometimes no) water, depending on how much otherwise impounded water petitioner releases into the bypass through "spillways" or "sluice gates." Petitioner's impoundments range from 8 to 197 acres, and its dams are as tall as 50 feet. Pet. App. A74-A77. The joint appendix (pp. 9-17) includes narrative descriptions and illustrations of each of the five facilities.

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[4] *See generally Hydropower Engineering Handbook* (John S. Gulliver ed., 1991); Am. Soc'y Mech. Eng'rs, *The Guide to Hydropower Mechanical Design* (1996); C.C. Warnick, *Hydropower Engineering* (1984).

[5] As a practical matter, even such projects like petitioner's that are run on an "instantaneous basis" require some manipulation of water levels. Petitioner's projects allow for "maximum 1-foot impoundment fluctuations." Pet. App. A36. *See* U.S. Army Corps of Eng'rs, *Engineer Manual: Hydropower Engineering and Design* (Dec. 31, 1985) (EM 1110-2-1701); U.S. Dep't of the Interior, Bureau of Reclamation Power Research Office, *Hydropower* 6 (July 2005), *available at* http://www.usbr.gov/power/edu/pamphlet.pdf.

III. Proceedings Below

1. FERC originally licensed petitioner's five hydroelectric facilities pursuant to the Federal Power Act, 16 U.S.C. § 797(e), in separate actions between 1979 and 1981.[6] Because each of these licenses expired on January 26, 2001, petitioner applied to FERC for new 40 year licenses. As part of that process, FERC regulations required that petitioner's applications include either a copy of a water quality certification issued by the State of Maine pursuant to Section 401 of the Clean Water Act, a request for such a certification, or evidence of a waiver by the State of Maine of such a certification. *See* 18 C.F.R. § 4.34(b)(5)(i). Because Maine did not waive its certification authority, petitioner filed a request for certification with the State. In making that request, however, petitioner claimed that Section 401 does not apply to any of its five hydroelectric facilities on the ground that none resulted in a "discharge into navigable waters," within the meaning of that statutory provision.

2. Respondent Maine Department of Environmental Protection (DEP) rejected petitioner's contention that Section 401 does not apply to its hydropower facilities, concluding that the "proposed continuing operation of the Presumpscot River Projects qualifies as an 'activity' * * * which may result in (a) discharge into the navigable waters of the United States." Pet. App. A82. The DEP ultimately granted Section 401 certification to each of petitioner's five facilities subject to a series of express conditions that the DEP concluded were necessary to ensure compliance with State water quality standards that the State had upgraded in 1985 pursuant to the Clean Water Act. Pet. App. A121-A140; *see* 33 U.S.C. § 1313(c).

The DEP based its conditions on the State water quality

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[6] Although petitioner was operating hydroelectric projects and therefore subject to federal regulation long before 1979, the federal government did not formally declare the Presumpscot River a "navigable water" until 1966. *See Cent. Me. Power Co.*, 36 F.P.C. 976, 977 (1966).

standards applicable to each of the segments of the Presumpscot River where petitioner's five facilities were located. For each segment, the DEP identified the applicable water quality classifications, designated uses, and numeric and narrative water quality criteria. Pet. App. A83-A87. The DEP concluded that petitioner's proposed operation of its facilities would cause violations of those State water quality standards, including dissolved oxygen standards applicable to certain segments of the river, and violations of the designated uses of fishing and habitat for fish and other aquatic life applicable to all segments, including the bypass reaches. *Id.* at A88-A89, A106-A107, A111-A112, A116.[7]

The DEP explained how impoundment of waters behind dams affects dissolved oxygen by reducing natural aeration, increasing time of water travel, increasing water temperature, and creating settling basins for sediments and nutrients. Pet. App. A114. The DEP further described how reductions in the amount of water because of reduced flow in segments, especially bypass reaches, adversely affects the quality of water in those segments. *Id.* at A94, A101-110. The amount of water affects water temperature and other physical, chemical, and biological criteria relevant to the water body's ability to serve as an aquatic habitat. *Id.* Accordingly, the DEP conditioned its Section 401 certification on, *inter alia*, increased releases to meet dissolved oxygen standards, increased releases to meet designated uses of habitat for fish and other aquatic

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[7] Maine water quality standards include classifications for individual water bodies and standards for each classification, with corresponding designated uses, numeric criteria, and narrative biological water quality criteria. *See* 38 M.R.S.A. §§ 467-470, 465-465-C. The Maine Legislature determines each water body's classification. There are four classes of water that are not "great ponds," Classes AA, A, B, and C, and Class GPA for waters classified as great ponds. *Id.* § 465; *see* Pet. App. A84-87. The Presumpcot River has different classifications for different segments. The waters at issue in this case are designated Class A, B, and C, and Dundee Pond is designated Class GPA. Pet. App. A83-A84. Notwithstanding these different classifications, all of these waters must be suitable for designated uses of fishing and habitat for fish and other aquatic life. 38 M.R.S.A. § 465.

habitat, restrictions on water levels and flow to avoid maintenance drawdowns in facility impoundments, and the installation of upstream and downstream passage facilities for specific species of fish. *Id.* at A121-A140.

3. Petitioner appealed the DEP's decision to the Maine Board of Environmental Protection (BEP), which affirmed the DEP in all respects. Pet. App. A35-A73. The BEP agreed with the DEP that each of petitioner's hydroelectric facilities would result in "discharges," within the meaning of Section 401, specifically rejecting petitioner's contention that Section 401 required such discharges to include pollutants. *Id.* at A40-A42. The BEP further found that petitioner had "not presented any persuasive arguments or supplemental evidence calling into question the Department's determinations that the conditions in the Section 401 certification regarding bypass minimum flows, * * * fish passage, reaeration, and recreational facilities are necessary to ensure that the operation of the Presumpscot River Projects will comply with State water quality standards." *Id.* at A47.

4. The state trial court affirmed. Pet. App. A19-A34. The court concluded that "the rerouting of the natural flow of the river" constitutes a "discharge" sufficient to trigger Section 401, "despite the possible nonexistence of pollutants in the 'discharge.'" *Id.* at A22-A24. The court likewise rejected petitioner's claim that Section 401 was not triggered where, as here, an existing facility was being issued a new license and there were allegedly no new discharges from their "continued operation." *Id.* at A5. Finally, the court found that none of the Section 401 conditions was "clearly erroneous." *Id.* at A25-A34.

5. The Maine Supreme Judicial Court affirmed. Pet. App. A1-A18. The court rejected petitioner's claim that Section 401 State certification authority "has not vested because the operation of its dams does not result in a discharge." *Id.* at A6. The court reasoned that "the water that leaves the river and runs through the dam before returning to the river constitutes a discharge for the purposes of section [401]." *Id.* at A10. According to the

court, a Section 401 "discharge" is not limited to a "discharge of pollutant" and in this case "a discharge results because Warren's dams remove the water of the river from its natural course, exercise private control over the water and then *add* the water back into the river." *Id.* at A8 (emphasis in original).[8]

Introduction and Summary of Argument

For more than 150 years, petitioner has operated a series of hydropower facilities that have fundamentally transformed the physical, chemical, and biological integrity of Maine's historic Presumpscot River. White water has become flat water and the river's natural ability to serve as a host for a large and self-sustaining fishery, including populations of various anadromous fish, has been destroyed by petitioner's impoundment, diversion, and releases of water back into the Presumpscot.

This case will control the Presumpscot's future. For the past three decades, pursuant to the express language and direction of the Clean Water Act, the federal and state governments have worked cooperatively. They have sought to balance the Clean Water Act's directive to protect the water quality of our country's navigable waters and to restore their ability to serve as a habitat for fish and other aquatic life with the desire by those in private industry, such as petitioner, who seek to capture the potential energy contained within the natural flow of those waters. This cooperative federalism has not been without conflict but has, as a general matter, struck a successful balance between the competing public and private interests.

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[8] After the Maine BEP affirmed the DEP's certification and conditions, FERC granted petitioner's new license applications to operate its five hydroelectric facilities. *See S.D. Warren Co.*, 105 F.E.R.C. ¶¶ 61,009, 61,010, 61,011, 61,012, 61,013 (2003); *Multi-Project Order*, 105 F.E.R.C. ¶ 61,136 (2003). FERC upheld its orders on petition for rehearing by petitioner (*see S.D. Warren Co.*, 106 F.E.R.C. ¶ 61,087 (2004)), and the D.C. Circuit denied S.D. Warren's petition for review. *See S.D. Warren Co. v. FERC*, No. 04-1105 (D.C. Cir. May 6, 2005).

Pursuant to the federal statutory scheme, the State of Maine seeks now to "restore and maintain the chemical, physical, and biological integrity of the State's waters" (38 M.S.R.A. § 464(1)) by demanding for the first time in the history of petitioner's operations of its facilities that petitioner comply with water quality standards established by Maine and revised in 1985 under Section 303 of the Act. *See* 33 U.S.C. § 1313. Petitioner does not dispute that its operation of its five hydroelectric facilities violates those State standards. Petitioner claims the right to continue to operate its facilities for the next forty years unfettered by, and in violation of, the Presumpscot River's water quality standards, depriving Maine of its sovereign authority to ensure that those operations comply with those State standards. The Court should reject petitioner's claim and affirm the judgment of the Maine Supreme Judicial Court.

A. First, the plain meaning of Section 401 of the Clean Water Act belies petitioner's claim. Section 401 unambiguously authorizes States to ensure that federally licensed or permitted activities that "may result in any discharge into the navigable waters" comply with State water quality standards. Both the Maine environmental administrative agencies and the Maine courts correctly rejected petitioner's threshold jurisdictional claim that its facilities do not result in "any discharge" within the meaning of the Clean Water Act.

Petitioner's operation of each of its five hydroelectric facilities results in "discharges" because their releases of water into the Presumpscot River clearly amount to a flowing or issuing out, emission, or pouring forth, which is the ordinary meaning of the noun "discharge" in the context of water. The Act does not require an addition of pollutants for a discharge. Nor is there any merit to petitioner's contention that a discharge exists only if the waters being conveyed originated from a water body different from the one in which they are being released. Congress deliberately provided only that a discharge "includes" a discharge of a pollutant and, in sharp contrast

to virtually all of the other Act's definitions did not state that discharge "means" discharge of a pollutant. And, while Section 401 provides that the discharge must be "into" navigable waters, the word "into" does not mean that there must be an addition of something not previously in the same water body.

B. The plain meaning of "discharge" in Section 401 is confirmed by the purpose, structure, and legislative history of the Clean Water Act. The structure and purpose demonstrate that Congress intended that the Act's protection of water quality would not be limited to reduction of discharges of pollutants and that the States would retain the primary responsibility and right to safeguard water quality by ensuring compliance with State water quality standards within their borders. Congress, accordingly, provided States with broad authority to establish and enforce water quality standards, and the federal legislature defined "pollutant" and "pollution" in a manner reflective of the myriad ways beyond pollutant discharges that water quality can be adversely affected to guard against the very kind of unduly constrained construction petitioner now advances.

Petitioner's reliance on Clean Water Act Sections 304(f)(2) and 511(c)(2) is entirely misplaced. Neither provision remotely addresses the meaning of "any discharge" in Section 401. The former merely instructs the Administrator to gather certain information about pollution sources that are sometimes, but not exclusively, nonpoint in nature, and the latter does no more than limit the applicability of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*, in circumstances wholly unrelated to this case.

The relevant legislative history, moreover, leaves no doubt that Congress understood and expressly sought in Section 401 to authorize States to require federally licensed hydroelectric facilities to comply with State water quality standards. Both when Congress in 1970 originally enacted the language now included in Section 401 and when Congress first passed Section 401 itself in the Clean Water

Act two years later, accompanying legislative reports and floor debates specifically discussed its applicability to hydroelectric facilities. Significantly, none of the textual limitations petitioner would now import into the meaning of "discharge" – "pollutant," "addition," and "discharge of a pollutant" – is found anywhere in the 1970 law from which Section 401 originates.

C. Finally, settled federal agency construction is likewise consistent with the plain meaning of "any discharge." The federal government, including FERC and EPA, has long maintained that the operation of hydroelectric facilities results in "discharges" sufficient to trigger Section 401. Those authoritative interpretations are reflected in numerous administrative rulings, agency reports, and briefs filed by the Solicitor General with this Court. All parties, including the States, regulated industry, and individual persons, have reasonably relied on that settled understanding for decades. If petitioner seeks to change the law, its only recourse for doing so should be before Congress and not this Court.

Argument

Section 401 of the Clean Water Act authorizes States to ensure that federally licensed or permitted activities that "may result in any discharge into the navigable waters" comply with State water quality standards. In this case, petitioner does not dispute that its five hydroelectric facilities are each federally licensed or permitted within the meaning of Section 401. Nor is there any question that the five hydroelectric facilities are causing a violation of State water quality standards. The Maine Department of Environmental Protection (DEP) ruled that such a violation would result; the Maine Board of Environmental Protection (BEP) affirmed the validity of that factual finding; and the trial court upheld the finding, as did the Maine Supreme Judicial Court.

Petitioner also does not dispute that State water quality standards under Section 401 apply to the water quality

impacts of the federally licensed activity as a whole. Petitioner does not, accordingly, ask this Court to overturn its ruling in *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. at 711-12, that the certification goes to the entire activity's impact on State water quality standards and is not limited to just the discharge itself, which is simply the trigger. Nor does petitioner dispute the *PUD No. 1* Court's further holding that "a State may include minimum stream flow requirements in a certification issued pursuant to § 401 of the Clean Water Act insofar as necessary" to comply with a state water quality standard designated use that the water quality be sufficient for fish habitat. *Id.* at 723. Finally, petitioner does not dispute that each of its five hydroelectric facilities includes the kind of conveyances of water that, apart from the question whether discharges must always add pollutants, amount to a "point source" within the meaning of the Clean Water Act. Petitioner's claim (Br. 25) is "that section 401 is inapplicable" even if its facilities' conveyances of water are "from a point source."[9]

The only question before this Court, therefore, is whether any of the point source releases of water from each of petitioner's five facilities constitute a "discharge"

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[9] Petitioner's indirect concession that its dams include the kinds of conveyances treated as point sources when emitting pollutants is compelled by the Act's express terms. The Act expressly defines "point source" to include "a discernible, defined, discrete conveyance" and further lists "channel" as an illustrative example of such a source. 33 U.S.C. § 1362(14). As accurately described in petitioner's own brief, its facilities first "*channel*[water] into a 'power canal,' past the turbines, and then back into the riverbed through a 'tailrace *channel*'" Pet. Br. 3 (emphasis supplied). It is only because the parties have stipulated that petitioner's conveyances do not include pollutants that this litigation does not raise the distinct question whether dams are point sources that discharge pollutants and therefore are subject to Section 402 of the Clean Water Act, 33 U.S.C. § 1342. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). Because, however, each of petitioner's hydroelectric facilities so clearly include at least one conveyance akin to a point source, such as the tailrace channel, this case also does not provide an occasion for this Court to consider the further question whether nonpoint sources can constitute a Section 401 "discharge." *See Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1095-99 (9th Cir. 1998).

within the meaning of Section 401. Petitioner maintains (Pet. Br. 14-20) that releases of water from a facility do not constitute discharges so long as the water being released downstream comes from the same water body from which the facility initially diverted the water upstream. The lower courts correctly rejected that claim, which is inconsistent with Section 401's plain meaning, the structure, purpose, and legislative history of the Clean Water Act, and longstanding administrative interpretation and implementation left undisturbed by Congress.

Indeed, the legal issue has been so well settled that otherwise opposing parties before this Court in *PUD No. 1* long ago agreed that the operation of hydroelectric facilities are subject to Section 401 because they "may result in discharges into navigable waters." 511 U.S. at 711 ("Petitioners concede that, at a minimum, the project will result in two possible discharges - the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace * * * ."). Nothing in this Court's decision in *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004), disturbs the correctness of that view.[10]

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[10] In the lower courts, petitioner raised a second, distinct claim, only indirectly hinted at in its petition - that even if petitioner's facilities would in theory require Section 401 certification upon initial licensing, their "continued operation" does not because "relicensing of these existing Projects will not 'result in' any new discharge." Pet. 21. The Maine DEP, BEP, and lower courts each correctly rejected all of petitioner's jurisdictional arguments, with only the trial court singling out this distinct argument for separate discussion (*see* Pet. App. A25). In its merits brief before this Court, however, petitioner nowhere mentions this additional argument, apparently abandoning it altogether. And for good reason. In the context of an application for a new license upon an existing license's expiration, the relevant "activity" under Section 401 is the facility's future operation, which includes the possibility that it "may result in any discharge." Whether that activity is the same as has been licensed or permitted in the past is of no legal consequence under the statutory language. Similarly, under the Federal Power Act, FERC can consider the future consequences of an existing hydroelectric facility's operation and deny a new license altogether, grant the license or, as FERC did here, grant a license subject to new conditions beyond what it had imposed in the

I. The Diversion and Release of Waters into the Presumpscot River by Petitioner's Hydroelectric Facilities Are "Discharges" into Navigable Waters within the Plain Meaning of Section 401

"The task of resolving the dispute over the meaning of [Section 401] begins where all such inquires must begin: with the language of the statute itself." *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989). "In this case, it is also where the inquiry should end" (*id.*) because the meaning of "discharge" in the context of the Clean Water Act is plain. The operation of each of petitioner's five hydroelectric facilities "results in [a] discharge into navigable waters," within the plain meaning of Section 401 of the Clean Water Act.

1. All five of petitioner's facilities are impounding and diverting waters from their natural flows, and then all five release diverted waters into navigable waters. The fact that the waters being released or otherwise flowing from petitioner's facilities originate from the same navigable water body upstream does not take them outside the plain meaning of discharge under Section 401. The plain meaning of discharge does not consider the source of the discharge, but only requires that the discharge be "into" navigable waters, and the Presumpscot River is indisputably such a water body.

That plain meaning is provided by the ordinary meaning of the word "discharge" in the statutory context of the Clean Water Act. Although the Act provides that the term "discharge" "*includes*" "discharge of a pollutant," the Act defines only what "discharge of a pollutant" "*means*" and never defines the meaning of "discharge" standing alone, which is how it stands in Section 401. Compare 33 U.S.C. § 1362(16) ("'discharge' * * * includes") with *id.* § 1362(12) ("'discharge of a pollutant' * * *

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past license. *See* 16 U.S.C. § 808(a)(1) ("[T]he Commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations * * *").

means"). It is appropriate in this circumstance to look to authoritative dictionary definitions of "discharge" to discern its common, ordinary meaning. *See Perrin v. United States*, 444 U.S. 37, 42 (1979); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975).

The ordinary meaning of the noun "discharge" in the context of water is "a flowing or issuing out," "emission" or "pouring forth." *The American Heritage Dictionary of the English Language* 514 (4th ed. 2000) ("a flowing out or pouring forth; emission"); *Webster's Third New International Dictionary* 644 (3d ed. 1971) ("a flowing or issuing out"; "emission"); *Webster's Second New International Dictionary* 742 (2d ed. 1957) (same); *The Oxford English Dictionary*, 731-32 (2d ed. 1989) ("the act of * * * pouring forth; emission").[11] The *Oxford English Dictionary* refers to "the mouth of a river" as an example of a "place where something is discharged." *The Oxford English Dictionary* 732. It even provides an historical example from 1798 of the use of the term "discharges" in relation to the operation of dams. *Id.*[12]

2. Petitioner's operation of each of its five hydroelectric facilities results in "discharges," within the plain meaning of that term. Their releases of water clearly amount to "a flowing or issuing out," "emission" or "pouring forth." The tailrace channels, from which water diverted upstream and channeled through turbines is released back into the Presumpscot River downstream, are the most

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[11] *See PUD No. 1*, 511 U.S. at 725 (Thomas, J., dissenting) ("The term 'discharge' is not defined in the CWA, but its plain and ordinary meaning suggests 'a flowing or issuing out,' or 'something that is emitted.' *Webster's Ninth New Collegiate Dictionary* 360 (1991).").

[12] The plain, ordinary meaning of "discharge" in the context of water is further confirmed by other provisions of the Clean Water Act. Section 311 of the Act concerns liability for oil spills in navigable waters and Section 312 provides for federal standards of performance for marine sanitation devices. For the purposes of each of these sections, the Act specifically provides that "'discharge' includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping * * *." 33 U.S.C. §§ 1321(a)(2), 1322.

obvious examples of such discharges.[13]

Not surprisingly, government manuals and regulations describing the operation of dams, including hydropower facilities, invariably refer to their releases through spillways, gates, flashboards, channels, and turbines all as "discharges," consistent with the ordinary meaning of that term. *See, e.g.*, U.S. Army Corps of Eng'rs, *Engineer Manual: Hydropower Engineering and Design, supra*, at S-4; 18 C.F.R. § 12.31(c)&(d) (FERC regulation); 33 C.F.R. § 162.230(a) (Coast Guard regulation); 33 C.F.R. §§ 207.170(b), 207.310(d), 207.320(c), 208.26(k), 222.2, 222.6 (Army Corps of Eng'rs regulations).

II. None of Petitioner's Arguments in Support of Its Claim that Its Hydroelectric Facilities Do Not Result In Discharges into Navigable Waters Has Merit

Petitioner's entire case rests on the erroneous threshold proposition that a discharge exists for purpose of Section 401 only if what is being emitted into navigable waters by the federally permitted or licensed activity constitutes an "addition." Petitioner further argues that an "addition" cannot be present where, as here, the facility is not itself adding pollutants and is emitting water downstream into the same navigable water body from which it initially diverted water upstream. Petitioner purports to buttress this argument by pointing out that Section 401 requires that the discharge be "into" navigable waters, which petitioner claims can occur only if the discharges originate outside the same navigable water body. *See* Pet. Br. 14-20.

Petitioner's argument is triply flawed. First, a "discharge" does not require an "addition" in the Clean Water Act. Petitioner is mistakenly equating the meaning of the distinct term "discharge of a pollutant," which does

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[13] The operation of the tailrace channels and the manner in which each conveys water into the Presumpscot River is well illustrated in the sketches of each of petitioner's five facilities prepared as part of FERC's Final Environmental Impact Statement, reproduced in the Joint Appendix at 11, 13, 14, 15, 17.

require such an "addition" of pollutants, with the meaning of "discharge," standing alone in Section 401, which does not. Second, as this Court itself has expressly recognized in the Clean Water Act context, a statutory requirement that a discharge be "into" navigable waters does not mean that the discharge must be conveying waters not previously in that same water body.

Finally, and perhaps most fundamentally, in presuming that the water being released by the hydroelectric facility downstream is the same water as that diverted upstream, petitioner completely misapprehends both the nature of water itself and the sweep of the Clean Water Act's concern with water quality. While the *amount* of water downstream may be the same as the amount diverted upstream, it is decidedly not the same water for the purposes of the statute. The facility has changed it, which is why the facility's operation causes a violation of State water quality standards.

A. Section 401 Requires "Any Discharge" into Navigable Waters and Not an "Addition" to Navigable Waters

1. Petitioner's claim that Maine lacks Section 401 certification authority rests on the novel proffer that when Congress stated that "the term discharge 'includes' the discharge of a pollutant, Congress meant that a discharge *requires* the discharge of a pollutant." Pet. 20 (emphasis in original). The response, of course, is that "includes" does not mean "requires." Quite the opposite. The language and structure of the Clean Water Act leave no doubt that Congress deliberately declined to define the term "discharge" in a limited way in order to guard against the very kind of unduly constrained construction petitioner now advances.

Section 502 of the Clean Water Act sets forth 23 different terms of art and their definitions. *See* 33 U.S.C. § 1362. In every single instance but one, Congress wrote

those definitions in terms of what each "term * * * *means*."[14] Congress, accordingly, provided that "[t]he term 'discharge of a pollutant' and the term 'discharge of pollutants' each *means* * * * any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12) (emphasis added).

Congress, however, made one exception in Section 502's list of 23 terms, declining in that single isolated instance to define the term "discharge" exclusively with reference to what it "means." Congress separately provided that "[t]he term 'discharge' when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16) (emphasis supplied). The import of the congressional decision to use the verb "includes" instead of "means" is well settled. "Where the definition of a term * * * was intended to be all inclusive, it is introduced by the phrase 'to mean' rather than 'to include.'" *United States v. New York Tel. Co.*, 434 U.S. 159, 169 n.15 (1977). "The natural distinctions would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition."

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[14] *See* 33 U.S.C. §§ 1362(1) ("The term 'State water pollution control agency' *means* * * *"); 1362(2) ("The term 'interstate agency' *means* * * *"); 1362(3) ("The term 'State' *means* * * *"); 1362(4) ("The term 'municipality' *means* * * *"); 1362(5) ("The term 'person' *means* * * *"); 1362(6) ("The term 'pollutant' *means* * * *"); 1362(7) ("The term 'navigable waters' *means* * * *"); 1362(8) ("The term 'territorial seas' *means* * * *"); 1362(9) ("The term 'contiguous zone' *means* * * *"); 1362(10) ("The term 'ocean' *means* * * *"); 1362(11) ("The term 'effluent limitations' *means* * * *"); 1362(12) ("The term 'discharge of a pollutant' and the term 'discharge of pollutants' each *means* * * *"); 1362(13) ("The term 'toxic pollutant' *means* * * *"); 1362(14) ("The term 'point source' *means* * * *"); 1362(15) ("The term 'biological monitoring' *shall mean* * * * *"); 1362(17) ("The term 'schedule of compliance *means* * * *"); 1362(18) ("The term 'industrial user' *means* * * *"); 1362(19) ("The term 'pollution' *means* * * *"); 1362(20) ("The term 'medical waste' *means* * * *"); 1362(21) ("The term 'coastal recreation waters' *means* * * *"); 1362(22) ("The term 'floatable material' *means* * * *"); 1362(23) ("The term 'pathogen indicator' *means* * * *") (emphasis supplied in all parentheticals).

Helvering v. Morgan's, Inc., 293 U.S. 121, 125-26 n.1 (1934).[15]

There is, accordingly, no merit to petitioner's central claim that by providing that "the term discharge 'includes' the discharge of a pollutant, Congress meant that a discharge *requires* the discharge of a pollutant." Pet. 20 (emphasis in original). Congress's selective use of the verb "includes" instead underscores that a statutory reference to "'discharge' when used without qualification," as is true for Section 401, "includes a discharge of a pollutant, and a discharge of pollutants," but is not limited to those kinds of discharges. 33 U.S.C. § 1362(16). "Discharge" refers to a "general class" and "discharge of a pollutant" or "pollutants" are simply "particular instances * * * specified in the definition." *Helvering*, 293 U.S. at 125-26 n.1.

2. For that same reason, likewise lacking merit is petitioner's related claim that a "discharge" exists only if there is an "addition" to navigable waters of the United States. Because only "discharge of a pollutant and * * * pollutants" are defined to mean "any addition of any pollutant to navigable water" (33 U.S.C. § 1362(12)), the Act cannot be fairly read as similarly requiring that a "discharge," standing alone, requires an "addition," let alone an "addition of any pollutant."[16] Neither an "addition" nor a "pollutant" requirement is therefore

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[15] *See United States v. American Trucking Assn*, 310 U.S. 534, 545 n.29 (1940) ("Congress gives recognition to the fact that the term is not on its face all-inclusive" by using the modifier "includes" rather than "means"); *Groman v. Commissioner*, 302 U.S. 82, 86 (1937) ("when an exclusive definition is intended the word 'means' is employed * * * whereas here the word used is 'includes'"); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941) ("The word 'including' does lend itself to such destructive significance.").

[16] As demonstrated at pages 40-43, *infra*, the legislative history confirms the absence of any congressional intent to include an "addition" requirement. When Congress first enacted the statutory language now found in Section 401, "addition" was not even a relevant term of art under then existing federal water pollution control legislation.

necessary to trigger Section 401's State certification requirement.[17]

B. Petitioner's Reliance on the Statutory Requirement that the Discharge Be "Into" Navigable Waters and on this Court's Decision in *Miccosukee* Is Misplaced

Petitioner further argues (Pet. Br. 17, 20-22) that Section 401's requirement that the discharge be "into" navigable waters and this Court's decision in *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004) both support petitioner's claim that a Section 401 discharge requires an "addition" and that no such addition exists in this case. Neither that statutory language nor this Court's ruling, however, supports petitioner's conclusion.

1. Contrary to petitioner's characterization (Pet. Br. 17),

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[17] In this respect, while we defend the judgment of the Maine Supreme Judicial Court below, we do not embrace its reasoning in all respects. We agree with the State court that a discharge need not include pollutants to trigger Section 401 (Pet. App. A8), but for the reasons described above, we do not agree with the court that a discharge requires "an addition." Pet. App. A6. Nor do we agree with the court's characterization of waters that are subject to private control as "hav[ing] lost their status as waters of the United States." Pet. App. A8 (emphasis in original omitted). We did not urge either of these arguments upon the State courts in the proceedings below; nor did we defend that aspect of the lower court's reasoning in our opposition to the petition in this case. *See* American Rivers Br. in Opp. 8 ("interpretations of what constitutes an 'addition' *** not applicable to what constitutes 'any discharge' under Section 401"). None of those statements by the State court about "addition" is, moreover, necessary to defend its judgment because a Section 401 discharge does not require an "addition" according to its plain terms. If, however, this Court were to conclude otherwise, we do agree with the State court that the requisite "addition" would in any event be present in these cases, but not for the precise reasons offered by that court. The addition would not be because the waters somehow lost their status as "waters of the United States" once subject to private control, but because petitioner's facilities themselves transform the "physical, chemical, and biological integrity" of the waters by their impoundment, diversion, and channeling, and in that fundamental respect clearly "added" something to the waters not previously present within them. *See* pages 30-32, *infra*.

it does not "stretch[] credulity" to posit that discharges from a hydroelectric facility are going "into" the river when the water originates from the same water body upstream. The word "into" is a compound preposition of direction that is formed by adding the word "in" to the basic preposition of direction "to." The exclusive focus of the preposition of direction "into" is to signify movement in the direction of a goal. *See* Bryan A. Garner, *Garner's Modern English Usage* 436 (2003); *The Chicago Manual of Style* § 5.163 (15th ed. 2003). Where the object being moved was previously located is wholly irrelevant. There is nothing inconsistent with the notion that an object is being moved "to" or "into" a particular location where the object may have previously been before. A more precise way to describe such an action, while not grammatically necessary, is to state that the object is being moved "back to" or "back into" the previous location.

Where, as with Section 401, the relevant language simply says "discharge into," the preposition "into" admits of all possible circumstances, regardless of whether the discharge is into a new or previous location. There is nothing about the word "into" that suggests that a "discharge into navigable waters" must be an "addition" of something not previously in that same water body. When water is diverted from a navigable water body, the flow back from the diversion is "into" navigable water.

In *Miccosukee*, this Court made clear that "into" did not require an "addition" and, ironically, did so in the very sentence upon which petitioner otherwise heavily relies (*see* Pet. Br. 21): the Court's quotation of a Second Circuit statement that "'[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back *into* the pot, one has not 'added' soup or anything else to the pot." *See* 541 U.S. at 110 (emphasis added) (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2d Cir. 2001)). Neither this Court nor the Second Circuit, therefore, considered it incredulous to describe an object going "into" a waterway even when it had previously been in that same waterway. Indeed, nor do

even petitioner or any of its supporting amici before this Court, notwithstanding their legal arguments to the contrary. Their legal briefs are replete with descriptions of their respective hydropower facilities emitting waters "into" rivers downstream.[18]

2. Petitioner's even broader reliance (Pet. Br. 20-22) on this Court's decision in *Miccosukee* is likewise unavailing. Contrary to petitioner's claim, *Miccosukee* does not support the "conclusion[] that a discharge into the river requires an addition of something to the river." *Id.* at 20. Neither Section 401 nor the meaning of the term "discharge," standing alone, was at issue in *Miccosukee*. As petitioner itself acknowledges, the exclusive question presented in *Miccosukee* was whether a specific pumping facility was subject "to *Section 402* of the Clean Water Act," which requires a permit "for any facility that causes 'the discharge of any pollutant.'" Pet. Br. 20 (emphasis supplied). What petitioner's argument conveniently elides is the fundamental distinction between Section 401 and Section 402 that is fatal to its claim: While the Section 402 permit requirement at issue in *Miccosukee* is triggered under Section 301(a) only by the "discharge of any pollutant" (33 U.S.C. § 1311(a)), State certification authority under Section 401 is triggered by "any discharge" without the additional requirement that the discharge be of "any pollutant."

For this reason, petitioner's reliance on *Miccosukee* collapses back into its argument that "discharge" *means* "discharge of a pollutant" because "includes" means

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[18] *See, e.g.*, Pet. Br. 3 ("water is channeled * * * back *into* the riverbed through the 'tailrace channel'") (emphasis supplied); Amicus Br. New England Legal Foundation in Support of Petitioner, 10 ("the physical removal from and the replacement of the same water *into* the same body of water, cannot qualify as an 'addition') (emphasis supplied); Amicus Br. Salt River Project & Agric. Impr. & Power Dist. in Support of Petitioner, 1-2 ("water stored behind SRP dams * * * flows through an outflow tunnel in the dam *into* the river downstream") (emphasis supplied); Amicus Br. City of Augusta, Ga, in Support of Petitioner, 1 ("a channel that routes water from the River * * * and back *into* the River again") (emphasis supplied).

"requires." As described above, the latter argument lacks merit and nothing in *Miccosukee* animates it. No doubt that is why petitioner failed even to cite to *Miccosukee* in its briefs before the Maine Supreme Judicial Court.

C. Petitioner's Characterization of a Hydroelectric Facility as "Mere Flow of a River Through a Dam" Ignores the Undisputed Fact that Its Facilities Cause Violations of State Water Quality Standards

Petitioner bookends its entire presentation from the "Question Presented" to the "Conclusion" with the flawed notion, repeated throughout its brief, that a hydroelectric facility is a "mere flow of a river through a dam." Pet. Br. i, 13, 14, 18, 20, 21, 25, 26, 34; *see also id.* at 13 ("merely touch upon the navigable waters"). Petitioner, however, completely misapprehends the nature of hydroelectric facilities, the nature of water in the ecosystem, and the sweep of the Clean Water Act's concern with water quality in presuming that the water being released by the facility downstream is essentially the same water as that impounded and diverted upstream. Petitioner's facilities have a profoundly destructive impact on the quality of the waters of the Presumpscot River.

1. While the *amount* of water ultimately flowing downstream may eventually be the same as the amount of water originally impounded and diverted upstream, it is decidedly not the same water for the purposes of the Clean Water Act. The hydroelectric facility has changed it, which is why each facility's operation causes a violation of State water quality standards and therefore is "pollution" affecting the "chemical, physical, and biological * * * integrity of the water," within the meaning of the Act. *See* 33 U.S.C. § 1362(19). No pollutants need be physically added for the occurrence of the kind of degradation of water quality that constitutes water pollution within the Act's broad sweep. Indeed, a hydroelectric facility fundamentally alters the physical and ecological integrity of a river when white water becomes flat water. That is

precisely why Section 401, unlike Section 402, is not limited to pollutant reduction and is instead more broadly directed at the adverse impacts on water quality of discharges and their related activities.

Hydropower facilities, including so-called "run-of-the-river" facilities like petitioner's, transform the physical, chemical and biological nature of the water. Water does not merely flow passively through a hydroelectric facility. If it did, the facility would not be serving its intended function, which is to remove the energy of the water contained within its flow potential. Hydroelectric facilities such as petitioner's deliberately impound, divert, channel, and release water in order to convert the energy within that flow into electrical energy in a manner similar to the way that petitioner's mill dams more than a century ago sought to produce mechanical energy. They necessarily have adverse environmental impacts, which is why they are regulated pursuant to a variety of federal and state laws, including State water quality standards. *See* Amicus Br. Water and Riverine Scientists in Support of Respondents; Amicus Br. National Wildlife Federation *et al.* in Support of Respondents.[19]

2. Respondent Maine DEP found that petitioner's proposed operations of its five facilities would each violate Maine water quality standards because of the adverse impacts of the entire activity and not just the discharges alone. Pet. App. A88-A89, A106-A107, A111-A112, A116.

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[19] For instance, by diverting water, hydropower projects create bypassed river channels with too little water remaining to meet the needs of in-stream ecosystems. The remaining low volume of water can be more easily heated and limit the ability of a water body to tolerate pollutants. N.L. Poff et al., *The Natural Flow Regime*, 47 Bioscience 769-84 (1997). By increasing depth and decreasing flow, an impoundment separates water into several layers with varying temperature, a process known as temperature stratification, which inhibits transfer of oxygen between layers. The subsequent release of some water low in dissolved oxygen and other water higher in temperature has detrimental impacts on downstream water quality. *See* B.L. Yeager, *Impacts of Reservoirs on the Aquatic Environment of Regulated Rivers* (Tenn. Valley Auth., Water Res., Aquatic Biology Dep't 1994) (TVA/WR/AB-93/1).

The DEP concluded that petitioner's impoundment of waters behind dams would lower dissolved oxygen by reducing natural aeration, increasing time of water travel, increasing water temperature, and creating settling basins for sediments and nutrients. *Id.* at 114. The DEP also based its findings on how reduced water flow in segments of the Presumpscot River, especially bypass reaches, adversely affects water quality in those segments to the extent that the smaller volumes in those segments affects water temperature and other physical, chemical, and biological criteria relevant to the water body's ability to serve as an aquatic habitat. *Id.* at 101-10. Here, as in *PUD No. 1*, "water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation, or as here, as a fishery." 511 U.S. at 719.

The validity of DEP's findings, which were upheld by the Maine BEP and the state courts, are not in dispute before this Court. Nor is the reasonableness of the license conditions required by the DEP pursuant to its Section 401 State certification authority. Petitioner's repeated references to a hydroelectric facility as a "mere flow of water through a dam" cannot be squared therefore with the undisputedly destructive impacts that its five facilities have had on the Presumpscot River and would continue to have on the river absent the license conditions being imposed by the State pursuant to Section 401.

D. In All Events, Petitioner's Discharge of Waters Downstream Would Amount to an "Addition"

Even if this Court were, contrary to our primary submission, to conclude that a Section 401 "discharge" does require an "addition" to navigable waters, such an addition would be present here. While we do not share the Maine Supreme Judicial Court's view that an "addition" is present because the waters of the Presumpscot River ceased being navigable waters once subject to private control (*see* note 17, *supra*), there is force

to the state court's basic finding that petitioner's facilities have in all events added something to the River.

As just described, the water discharged downstream by petitioner's facilities is different than the water originally impounded and diverted upstream because of those diversion and impoundment activities. The facilities have not therefore merely subtracted waters. Their discharges have added waters to the River downstream that are fundamentally different in their physical, chemical, and biological character than those impounded and diverted, and that cause water pollution.

We do not read this Court's statement in *Miccosukee* that a ladling of water in and out of a single water body does not constitute an "addition" as compelling a different conclusion. *See* 541 U.S. at 110. First, the Court was assuming that a passive ladling, as compared to an active hydropower facility, was not changing the nature of the water removed and released. The Court did not purport to address the quite different issue presented where, as here, the water being removed and then released is fundamentally different in character either because of the impact on water chemistry of those intervening activities or because the time or place of removal and release are sufficiently distanced so as to undermine the Court's essential assumptions of ecological equivalency. The Court was also not purporting to decide a legal issue at all but only describing an issue that it considered not disputed by the parties in that case. *See id.* at 109 ("The Tribe does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants.").[20] In no event, therefore, can the Court's

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[20] It is far from clear, moreover, that the Court was correct in its assumption that the facts and related legal issue were not in dispute in *Miccosukee* itself. Respondent Miccosukee Tribe filed a petition for rehearing on that precise ground, arguing that it had expressly declined to make such a legal or factual concession. *See* Petition for Rehearing of Miccosukee Tribe, *South Florida Management Dist. v. Miccosukee Tribe*, No. 02-626 (filed April 16, 2004). Although the Court denied the petition, that denial does not amount to a ruling on the

statement about the meaning of "addition" be considered precedent with regard to different factual circumstances presented in future cases.

For instance, the Clean Water Act clearly provides that the deposit of "dredged and fill material," which typically originates from the same water body in which it is deposited, constitutes a "discharge of pollutants" within the meaning of the Act. *See* 33 U.S.C. § 1344. The Act's definition of "pollutant" as including "dredged spoil," 33 U.S.C. § 1362(6), similarly contemplates that the removal from, and redeposit of, a substance into the same water body can, under certain circumstances, constitute the "addition" of a pollutant. As with river water that is diverted and processed through a hydroelectric facility before being released downstream, the act of dredging material from the bed of a stream transforms that substance into something new - "dredged spoil" or "dredged material" - that can adversely affect the quality of the stream when "added" back into it. [21]

III. The Plain Meaning of "Discharge" in Section 401 Is Confirmed By the Purpose, Structure, and Legislative History of the Clean Water Act

The conclusion that the plain meaning of a Section 401 "discharge" does not require a "discharge of a pollutant" is further supported by the Clean Water Act's structure, purpose, and legislative history. The structure and purpose demonstrate that Congress intended that the Act's protection of water quality would not be limited to reduction of discharges of pollutants and that the States would retain the primary responsibility and right to safeguard water quality within their borders. The legislative history confirms that Congress understood the critical role that Section 401 would play in ensuring that States retain authority to safeguard water quality,

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merits of the petition's substantive argument. *See* 541 U.S. 1057 (2004).

[21] *See generally* Amicus Br. Former EPA Asst. Administrators Charles Fox *et al.* in Support of Respondents.

including the provision's applicability to hydropower facilities.

A. Congress Intended to Give States Primary Authority to Ensure Compliance with State Water Quality Standards

As described at the outset of this brief (at pp. 3-7, *supra*), "Congress passed the Clean Water Act for the stated purpose of 'restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters.'" *SWANCC*, 531 U.S. 159, 166-67 (2001) (quoting 33 U.S.C. § 1251(a)). Congress established two different and complementary legislative pathways to accomplish that ambitious objective: (1) a series of federally-promulgated technology-based effluent reduction limitations aimed at discharges of pollutants administered through the Section 402 NPDES permit program; and (2) State water quality standards administered by the States under EPA's supervision to regulate water pollution more generally. *See* pages 3-5, *supra*. Consistent with this dual pathway, Congress intentionally did not restrict "discharge" to require "discharge of a pollutant." Nor did Congress limit the meaning of "pollution" to adverse effects on water quality caused by the introduction of "pollutants." And, in similarly crafting Section 401, Congress ensured that the Act's broader pollution prevention goals were not frustrated by a narrow focus on measures to reduce pollutants. Congress provided States with Section 401 authority to require compliance with State water quality standards by federally licensed activities whenever they might result in "any discharge" without the further need to establish a "discharge of a pollutant."

1. It is therefore no mere happenstance that Section 401 State certification authority is triggered by "any discharge," while Section 402 permitting requirements are triggered only by a "discharge of pollutants." *See* 33 U.S.C. §§ 1311(a), 1342(a). The former is concerned with water quality in general and the latter is central to the part of the Act aimed at reduction of pollutants in point source

discharges. Under Section 401, a State is authorized to certify whether a federally licensed activity resulting in a discharge complies with a host of the Act's provisions, including Section 303 under which States develop their State water quality standards. *See* 33 U.S.C. § 1341(a)(1) ("such discharge will comply with the applicable provisions of section[] * * * 303 * * * of this title"); *PUD No. 1*, 511 U.S. at 714 ("state water quality standards adopted pursuant to § 303 are among the 'other limitations' with which a State may ensure compliance through the Section 401 certification process"). By contrast, even the formal statutory title of the Section 402 permit program – the "National *Pollutant* Discharge Elimination System" – emphasizes Section 402's exclusive focus on pollutant reduction. *See* 33 U.S.C. § 1342 (emphasis supplied). That same distinction between the purposes and scope of Section 401 and 402 is also plainly why Congress provided that "discharge" "includes" rather than "means" discharge of a pollutant so as to allow for the broader regulatory sweep necessary in the context of water quality standards.

2. The same careful statutory distinction is reflected in Congress's decision to define "pollutant" and "pollution" quite differently in the Clean Water Act. The Act provides that "[t]he term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage" along with a host of other kinds of "discarded material." 33 U.S.C. § 1362(6). The Act does not, however, then define "pollution" strictly in terms of pollutants. Instead, consistent with the Act's overall objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (*id.* § 1251(a)), the Act broadly provides that "[t]he term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." *Id.* § 1362(19). The overriding statutory objective, like the complementary definition of "pollution," "incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, 'the word "integrity" * * * refers to a

condition in which the natural structure and function of ecosystems [are] maintained.' H. R. Rep. No. 92-911, p. 76 (1972)." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985). The definition of "pollution" thereby recognizes that the addition of pollutants, whether by discharge or otherwise, is not the exclusive cause of water pollution within the Act's purview.

Petitioner, therefore, completely misapprehends the nature of both water pollution and the Clean Water Act when it argues (Pet. 19) that the reason "discharge" must require the addition of a pollutant is because "it is clear from the outset that pollution is the *raison d'etre* for the statute." Petitioner presumes that there cannot be water pollution of concern to the Act without an addition of pollutants. As underscored by the Act's separate definitions of "pollutant" and "pollution," however, it is well settled that one can have pollution even absent this addition of pollutants. Indeed, for just this precise reason, this Court has already expressly found that "there is recognition in the Clean Water Act itself that reduced stream flow, *i.e.* diminishment of water quantity, can constitute water pollution." *PUD No. 1*, 511 U.S. at 719.

3. Congress's decision to provide States with certification authority whenever a federally licensed activity may result in a discharge, without requiring a discharge of pollutants, is also consistent with the Act's policy to "recognize, preserve, and protect the *primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution * * * ." 33 U.S.C. § 1251(b) (emphasis supplied). As described above (pp. 5-6, *supra*), the Clean Water Act creates a "a partnership between the States and the Federal Government, animated by a shared objective * * *" to restore and maintain the quality of the nation's waters. *Arkansas v. Oklahoma*, 503 U.S. at 101. Yet, with regard to the establishment and enforcement of State water quality standards, unlike the federally-promulgated technology-based effluent reduction limitations on discharges of pollutants, the States are akin to the senior partners. Albeit with some federal guidance and

supervision, the States develop the standards, including both the designated uses and water quality criteria, prepare the continuing planning process for their implementation, and "are responsible for enforcing water quality standards on intrastate waters." *PUD No. 1*, 511 U.S. at 707; *see id.* at 714-15; 33 U.S.C. §§ 1313, 1314(a). Section 401 promotes these same statutory objectives. As this Court explained, "[i]n addition to these primary enforcement responsibilities, § 401 of the Act requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters. 33 U.S.C. § 1341." *PUD No. 1*, 511 U.S. at 707.

4. Finally, neither Section 304(f)(2) nor 511(c)(2)(A) supports petitioner's claim that its hydroelectric facilities fall outside the scope of Section 401. *See* Pet. Br. 24, 26-28. Section 304(f)(2) in no manner intimates that hydropower facilities do not result in discharges subject to Section 401. And, Section 511(c)(2)(A) is far too slender a statutory reed to support the contention that Congress restricted the meaning of "discharge" to "discharges of pollutants."

a. Section 304(f)(2) is largely beside the point, which is likely why petitioner did not cite to it even once in any of its many pleadings before the Maine DEP or BEP, or the state courts. To be sure, Section 304(f)(2)(F) instructs the Administrator of EPA to provide to federal agencies, the States, and water pollution control agencies information, *inter alia*, about "methods to control pollution resulting from * * * changes in the movement, flow, or circulation of any navigable waters * * * , including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. § 1314(f)(2). But in no event does such a statutory requirement for the provision of information support petitioner's quite different claim that Congress intended to exempt hydropower facilities from Section 401 regulation. All Congress did in Section 304(f)(2) was expressly "recognize[] that water 'pollution' may result" from the operation of dams (*PUD No. 1*, 511 U.S. at 719-20) and, accordingly, instruct the Administrator

to gather and disseminate more information about ways to address the problem.

Congress did not suggest in Section 304(f)(2) or anywhere else in the statute that dams, or any of the other activities listed in that Section that cause water pollution, were exempt from otherwise applicable Clean Water Act requirements, whether arising under Section 402 or Section 401. Indeed, it has been settled law for decades that although Section 304(f)(2) generally concerns nonpoint sources, many of those same listed activities listed in that Section, including runoff from agricultural, silvicultural, mining, and construction, are sometimes point sources that discharge pollutants and are therefore subject to Section 402 for that reason. Federal courts of appeals and EPA have long expressed that view, which this Court also recently embraced.[22]

b. Section 511(c)(2) is no more favorable to petitioner. Petitioner relies heavily (Pet. Br. 26-28) on the fact that Section 511(c)(2) limits application of the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, when a federal agency is licensing or permitting conduct of any activity which "may result in the discharge of a pollutant into the navigable waters" but does not similarly limit NEPA's application when the activity includes only a "discharge." 33 U.S.C. § 1371(c)(2). Petitioner offers this as proof that Congress equated "discharge" with

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[22] *See Miccosukee*, 541 U.S. at 106 (emphasis in original) ("§1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition"); *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 372 (10th Cir. 1979); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 44 (5th Cir. 1980); Memorandum from Ann R. Klee, General Counsel & Benjamin H. Grumbles, Assistant Administrator for Water, *Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers* (Aug. 5, 2005) ("Mere mention of an activity in section 304(f) does not mean it is exclusively nonpoint source in nature."); EPA General Counsel Opinion, *Authority to Exclude Point Sources from the Permit Program* (Aug. 3, 1973) ("To be sure, sections 208(b)(2)(F) and 304(e) indicate that Congress thought that some agricultural runoff would not be a point source. However, these sections cannot be read to mean that pipes, ditches, etc., are not point sources when they occur on farms.").

"discharge of a pollutant." Section 511(c)(2), however, cannot possibly carry the substantive weight petitioner seeks to assign it.

Section 511(c)'s exclusive purpose is to define the applicability of the procedural requirements of NEPA to federal agency actions taken under the Clean Water Act. Section 511(c)(1) provides that certain activities shall not be deemed to trigger NEPA's environmental impact statement requirement (33 U.S.C. § 1371(c)(1)), and Section 511(c)(2) provides that nothing in NEPA shall be deemed to authorize review of certain actions taken under the Clean Water Act (33 U.S.C. § 1371(c)(2)). Neither Section 511(c)(1) nor 511(c)(2), upon which petitioner relies, evinces any intent to construe the scope or meaning of the Act, let alone upset its otherwise plain meaning.

In any event, petitioner is also wrong in suggesting that the language of Section 511(c)(2) is somehow inconsistent with the conclusion that the plain meaning of "discharge" does not require an addition of a pollutant. That Congress referred in Section 511(c)(2)(A) to "discharge of a pollutant" and not, as in Section 401, to a "discharge" merely confirms once again that Congress knew how to state "discharge of a pollutant" when it wanted to, as it did here and in Section 402. And, contrary to petitioner's assumption, there is good reason for why Congress drew that distinction in Section 511(c)(2).

Congress's purpose in Section 511(c) was to limit interference by NEPA's procedural requirements with the EPA's administration of the Section 402 or 404 permit requirements and the Agency's related promulgation of technology-based effluent limitations on discharges of pollutants under Sections 301 and 304(b). At the same time, however, Congress sought to allow for continued NEPA review when the safeguards presented by Sections 301, 304(b), 402, and 404 were not present. That is why Section 511(c)(2) limits NEPA review when there is a "discharge of a pollutant" but not when there is a "discharge" that does not include an addition of pollutants and therefore does not trigger Sections 301, 304(b), 402,

and 404. Indeed, during the committee and floor debate on the language, individual members of Congress discussed the need for NEPA review in just such a circumstance and even specifically referred to "such matters as dams licensed by the Federal Power Commission." 118 Cong. Rec. 10646 (1972) (statement by Rep. Abzug) (Feb. 24, 1972); *see also* H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 414 (1972) (Letter from Rep. Henry S. Reuss et. al, to Hon. John A. Blatnik, Chairman, House Committee on Public Works).[23]

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[23] Section 511(c)'s language regarding the applicability of NEPA to the Water Act was the result of considerable legislative compromise, reflected in floor debates on when NEPA should and should not apply to actions taken under the Clean Water Act, including Section 401 certifications. *See* 118 Cong. Rec. 10646-47, 10672-73 (1972) (statements of Representatives Abzug, Dingell, Wright, and Wolff). The versions of the bill initially passed and reported by both the House and the Senate each included broad NEPA exemptions for review of "water quality considerations" whenever there was a Section 401 certification and/or a Section 402 permit. *See* 117 Cong. Rec. 38885 (1971), reproducing S. 2770 (passed Senate, Nov. 2, 1971); 118 Cong. Rec. 10804 (1972), reproducing H.R. 11896 (passed House March 29, 1972). The Senate version applied broadly to "any discharge" (*see* 117 Cong. Rec. at 38887, reproducing S. 2770, § 511(d)) and the House version applied even more broadly to "any activity" (*see* 118 Cong. Rec. at 10828). The language, however, was significantly amended in Conference Committee to eliminate the broader reference to "any discharge" in favor of a narrower reference to "discharge of any pollutant," reflecting the competing concerns of those seeking to avoid NEPA interference with pollutant discharge permitting by EPA under Section 402 and those seeking to ensure that federal agencies other than EPA licensing activities that caused water quality problems still had to comply with NEPA. *See* 118 Cong. Rec. 33700-01 (1972) (statement of Senator Muskie presenting Conference Report); *id.* at 37059 (statement of Representative Dingell); H.R Conf. Rep. No. 92-1465, 92d Cong., 2d Sess. 148 (1972). Congress also had cause for concern that NEPA might otherwise interfere with administration of the Sections 402 and 404 permit program. A major impetus for congressional consideration of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, was a federal district court ruling in *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971), which enjoined the Army Corps of Engineers permit program under the Rivers and Harbors Act, 33 U.S.C. § 407, for failing to comply with NEPA. *See* William L. Andreen, *The Evolution of Water Pollution Control in the United States – State, Local and Federal Efforts, 1789-1972: Part II*, 22

B. Section 401's Legislative History Confirms that "Any Discharge" Includes the Release of Water from Hydropower Facilities Without a Showing of an "Addition of Any Pollutants"

The legislative history confirms Section 401's plain meaning, including both Congress's general intent not to require a showing of a "discharge of pollutants" and its specific intent to subject hydropower facilities to State water quality certification authority. This is not an instance where Congress allegedly "alter[ed] the fundamental details of a regulatory scheme in vague terms or ancillary provisions," akin to "hid[ing] elephants in mouseholes." *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001). Congress enacted the language of Section 401 specifically intending the precise result compelled by that language's plain meaning: to subject federally licensed hydropower facilities to State authority to ensure compliance with State water quality standards.

1. Section 401 originated as Section 21(b) of the Water Quality Improvement Act of 1970 ("1970 Act"), Pub. L. No. 91-224, 84 Stat. 91. The jurisdictional language from section 401(a) that is the focus of this case—"any activity * * * which may result in any discharge into the navigable waters"—is, as petitioner concedes (Pet. Br. 29), "the same language that had appeared in section 21(b) of the prior law." When Congress first enacted that language, Congress understood that it would apply to federally licensed hydropower facilities. A House Report responded to concerns that nuclear power projects would be subject to the certification requirement by noting "that a federal license or permit of some kind is required for almost *all electric generating plants*, and any federal agency granting the relevant license can and should condition the grant upon compliance with applicable water quality

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Stan. Envt'l L.J. 215, 260 (2003). By legislative compromise, the sole exception for NEPA review of Section 402 permits in the statute as finally enacted was for "the issuance of a permit under section 402 of this title for the discharge of any pollutant by a new source." 33 U.S.C. § 1371(c)(1).

standards." H.R. Rep. No. 91-127, 91st Cong. 1st Sess. 7 (1969) (emphasis supplied).[24]

Significantly, none of the textual limitations that petitioner would import into Section 401(a) – "pollutant," "addition," and "discharge of a pollutant" – is found anywhere in the 1970 Act. It was not until the 1972 Amendments, when Congress first mandated technology-based effluent limitations (sections 301 and 304) and corresponding permits for individual dischargers (sections 402 and 404), that the definitional terms on which petitioner relies were created. As previously described (*see* page 4, *supra*), the core of the technology-based program was set forth in Section 301, which prohibits "the discharge of any *pollutant* by any person" except in compliance with the Act - with "discharge of a pollutant" defined to mean "any *addition* of any *pollutant* to navigable waters from any *point source*." 33 U.S.C. § 1362(12)(A) (emphasis supplied). The terms "addition" and "pollutant" had no jurisdictional significance in any prior versions of the Clean Water Act extending as far back as 1948, and the phrase "discharge of a pollutant" had not appeared at all. It is clear, therefore, that when the water quality certification requirement first appeared in the 1970 Act, the phrase "any discharge" could not have contained the limitations petitioner advances.

2. Contrary to petitioner's claim (Pet. Br. 29-33), congressional recodification of Section 21(b) of the 1970 Act as Section 401 in the 1972 Act evinces no intent to reduce the scope of activities requiring State certification. Not only, as petitioner concedes (Pet. Br. 29), did Congress retain verbatim the same jurisdictional language of section 21(b)(1) - certification was still required of "[a]ny

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[24] The floor debates included numerous references, including by the floor managers of the legislation, similarly reflecting the legislators' shared understanding that the construction and operation of federally-licensed hydropower facilities would be subject to the State certification requirement. *See, e.g.*, 115 Cong. Rec. 28971 (1969) (statement of Sen. Cooper); 116 Cong. Rec. 8984 (1970) (statement of Sen. Muskie); *id.* at 9004 (statement of Sen. Cooper); *id.* at 9332 (statement of Rep. Fallon).

applicant for a Federal license or permit to conduct any activity * * * which may result in any discharge into the navigable waters" (Pub. L. No. 92-500, § 401(a)(1), 86 Stat. 877) - but the contemporaneous legislative reports made clear both congressional intent not to change the jurisdictional scope of the certification requirement and the legislative assumption that federally licensed hydropower facilities would continue to be covered.[25] Congress understood that "[t]he purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements." S. Rep. No. 92-414, at 69. "Quite obviously, reenacting precisely the same language would be a strange way to make a change." *Pierce v. Underwood*, 487 U.S. 552, 567 (1988).

3. Undaunted by either the plain meaning of the statutory language or the clarity of the statute's purpose, structure, and legislative history, petitioner tenaciously argues (Pet. Br. 30-31) that Congress should not be taken at its word. Petitioner asks this Court to read beyond the face of the language that Congress enacted and to discern behind that language a legislative purpose to narrow the

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[25] *See* S. Rep. No. 92-414, 92d Cong., 1st Sess. 69 (1971) ("section [401(a)] is substantially section 21(b) of existing law * * * amended to ensure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants"); H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 121 (1972) ("Section 401 is substantially section 21(b) of the existing law amended to assure that it conforms with the new requirements of the Federal Water Pollution Control Act"); S. Rep. No. 92-414, *supra*, at 69 ("It should be noted that the Committee continues [from section 21(b)] the authority of the State or interstate agency to act to deny a permit and thereby prevent a Federal license or permit from issuing * * * to a discharge source within such State * * * by such Federal agencies as the * * * Federal Power Commission"). The section was "amended to ensure consistency" with the new focus on technology-based effluent limitations by making clear that the certifying State was to certify not merely that the permitted activity would comply with applicable water quality standards (as required under the 1970 Act), but also with the standards and limitations of newly-adopted sections 301, 302, 306, and 307, 33 U.S.C. §§ 1311, 1312, 1316, 1317. *See* 33 U.S.C. § 1341(a).

scope of Section 401. Petitioner accordingly argues (*id.*) that Congress did not provide that "discharge" *means* "discharge of a pollutant" for only the very narrow purpose of making clear that "thermal discharge" would fall within the meaning of the term "discharge."

Petitioner's tenacity notwithstanding, its argument is belied by the language that Congress passed. Congress chose language that does not remotely hint at petitioner's proffered narrow purpose, which could have been easily and directly accomplished by quite different language. Congress instead took care to define the critical term "discharge" in a deliberately inclusive fashion so as not to restrict it to mean only a "discharge of a pollutant." All that the legislative history cited by petitioner demonstrates, therefore, is that Congress chose to reject language that might have been construed as limiting the meaning of "discharge" to either a "discharge of a pollutant" or "thermal discharge," in favor of a broad, inclusive, nonrestrictive definition.[26] This case provides no occasion for this Court to depart from the plain meaning of the language that Congress enacted in favor of a party's claimed discovery of a legislative body's true intent based upon snippets of legislative history.

III. Longstanding and Settled Administrative Construction of Section 401 and the Reasonable Reliance on that Construction Further Support the View that Hydropower Facilities Result in "Discharges" Within the Plain Meaning of Section 401

Maine's decision that petitioner's facilities require Section 401 certification is also consistent with the longstanding policy and practice of the federal Executive Branch dating back to 1970, when Congress first

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[26] Congress elsewhere resolved its debates about the proper status of thermal discharges by including "heat" within the definition of pollutant (*see* Pub. L. No. 92-500, 86 Stat. 886 (33 U.S.C. § 1362(6)), and by providing for regulation of "thermal discharges" more reflective of their distinctive character (*see* 86 Stat. 876 (33 U.S.C. § 1326(a)).

established the water quality certification program in Section 21(b) of the Water Quality Improvement Act. The Federal Power Commission (FPC), FERC's predecessor, began requiring water quality certification for original or new licenses for hydropower projects soon thereafter. And, EPA, which has principal responsibility for administering the Clean Water Act, has consistently maintained that Section 401 is triggered by the operation of a federally licensed hydroelectric facility. The States, along with thousands of public and private users of this Nation's water resources, have reasonably relied on this understanding of the water quality certification requirement for over 35 years, and there is no basis for this Court's upsetting those well-settled expectations.

A. The Federal Government Has Consistently Interpreted Section 401 as Requiring State Certification for the Licensing and Relicensing of Hydroelectric Facilities

1. Soon after Congress passed the 1970 Act in April 1970, the FPC began conditioning new licenses for existing facilities, as it did for initial licenses, on the applicant's compliance with the state water quality certification requirement under Section 21(b). With two early exceptions, the FPC made the submission of a "certification of reasonable compliance * * * with Section 21(b)" a condition of *every* new license that the FPC issued to an existing facility in a published order.[27] "[A]n

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[27] *See Empire Dist. Elec. Co.*, 44 F.P.C. 614, 616 (1970); *J.P. Stevens & Co.*, 44 F.P.C. 1041, 1042 (1970); *Cascade Power Co.*, 44 F.P.C. 1195, 1196 (1970) (similar condition); *W. Penn. Power Co.*, 44 F.P.C. 1279, 1280 (1970) (same); *Dan River Mills, Inc.*, 44 F.P.C. 1267, 1267-68 (1970) (same), vacated on other grounds, 51 F.P.C. 1861 (1974); *Cent. Me. Power Co.*, 44 F.P.C. 1451, 1451-52 (1970) (same); *Cent. Me. Power Co.*, 44 F.P.C. 1447, 1447-48 (1970) (same). Beginning in 1971, the FPC worded its license conditions differently in its published orders, while still making clear that compliance with the 1970 Act was required. *See Pac. Gas Elec. Co.*, 45 F.P.C. 30, 32 (1971) (license renewal conditioned on applicant "submit[ting] to the Commission certification of reasonable compliance with applicable water quality standards pursuant to Section 21(b) * * * or * * * otherwise demonstrat[ing] satisfactory

administrative 'practice has peculiar weight'" where, as here, "'it involves a contemporaneous construction of a statute' * * *." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978) (quoting *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933)). Moreover, prior administrative construction is even more weighty because when Congress recodified the certification requirement as Section 401(a) of the 1972 Water Act, Congress retained the same language to describe the scope of activities triggering that requirement. "[R]epetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (citing *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)).

2. No doubt for this reason, the FPC[28] and its successor

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compliance with the terms and purposes of said Water Quality Act"), *amending* 44 F.P.C. 1373 (1970); *Pac. Gas & Elec. Co.*, 45 F.P.C. 28, 30 (1971) (same), *amending*, 44 F.P.C. 1365 (1970); *Bibb Mfr. Co.*, 45 F.P.C. 525, 525 (1971) (same); *CWC Fisheries, Inc.*, 45 F.P.C. 980, 981 (1971) (same); *Leonard Lundgren*, 47 F.P.C. 1027, 1029 (1972) (same); *see also Wash. Water Power Co.*, 48 F.P.C. 339, 342 (1972) (noting that water quality certification has been obtained). *But see Wash. Water Power Co.& Lee W. Cagle*, 44 F.P.C. 626 (1970); *New Eng. Fish Co.*, 44 F.P.C. 723 (1970).

[28] For example, during the three years following the 1972 Act, every published FPC order issuing a new license to an existing hydropower facility notes that the applicant provided the Commission with proof of state water quality certification, or of waiver of the requirement. *See Scott Paper Co.*, 49 F.P.C. 256, 257 (1973); *Wis. Pub Serv. Corp.*, 50 F.P.C. 1013, 1015 (1973); *Village of Gresham, Wis.*, 51 F.P.C. 265, 265 (1974); *S.C. Elec. & Gas Co.*, 52 F.P.C. 537, 539 (1974); *Nekoosa Edwards Paper Co.*,52 F.P.C. 1020, 1021, (1974); *Wis. Mich. Power*, 52 F.P.C. 1201, 1201 (1974); *Pac. Gas & Elec. Co.*, 52 F.P.C. 1898, 1900 (1974); *Consol. Water Power Co.*, 53 F.P.C. 146, 147 (1975); *City of Seattle, Wash.*, 53 F.P.C. 207, 208 (1975); *Idaho Power Co.*, 53 F.P.C. 1004, 1008 (1975); *Wis. Pub. Serv. Corp.* 53 F.P.C. 1093, 1093 (1975); *Eagle-A/Linweave Div., Brown Co.*, 53 F.P.C. 1070, 1071 (1975); *Commonwealth Edison Co.*, 53 F.P.C. 1190, 1191 (1975); *Niagra of Wis. Paper Corp.*, 53 F.P.C. 1437, 1437 (1975); *Reeves Bros.*, 53 F.P.C. 1449, 1450 (1975); *Puget Sound Power & Light Co.*, 53 F.P.C. 1657, 1659 (1975); *Sho-me Power Corp.*, 53 F.P.C. 1999, 2000, 2009 (1975); *Wis. Pub. Serv. Corp.*, 54 F.P.C. 521, 522 (1975); *Wis. Pub. Serv. Corp.*, 54 F.P.C. 535, 537 (1975); *Ala. Power Co.*, 54 F.P.C. 2452, 2456 (1975); *Pac. Gas & Elec. Co.*, 54 F.P.C. 1750, 1752 (1975); *Utah Power & Light Co.*, 54 F.P.C. 2105, 2107 (1975); *Utah Power & Light Co.*, 54 F.P.C. 2433, 2435

agency, FERC, have uniformly maintained that interpretation after passage of the 1972 Act. In numerous adjudicatory decisions, FERC has treated water released from hydropower dams as a "discharge" for purposes of Section 401 without regard to whether the dam in question is discharging "pollutants" as that term is defined for purposes of other provisions of the Clean Water Act.[29] Indeed, in a recent decision, FERC squarely rejected the argument espoused by petitioner here - that a "discharge" for purposes of Section 401 requires the "addition" of a "pollutant," or at least the "addition" of something from the outside river. FERC distinguished this Court's decision in *Miccosukee* and reconfirmed its position that water released from a hydroelectric facility constitutes a "discharge" for purposes of Section 401. *See City of Augusta, Ga.*, 109 F.E.R.C. ¶ 61,210 (2004).[30]

(1975); *Ind. & Mich. Elec. Co.*, 54 F.P.C. 2739, 2743-44 (1975).

[29] *See, e.g., U.S. Gen. New Eng. Inc.*, 99 F.E.R.C. ¶ 62,025, 64,058 (2002); *Cent. Vt. Pub. Serv. Corp.*, 85 F.E.R.C ¶ 61,410, 62,557 (1998); *S.C. Elec. & Gas Co.* 73 F.E.R.C. ¶ 62,124, 64,307 (1995); *City of Fort Smith*, 42 F.E.R.C. ¶ 61,362, 62,047 (1988).

[30] Petitioner has mistakenly suggested that the D.C. Circuit's opinion in *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997) and FERC's litigation position in that case are to the contrary. Pet. 11, 15, 21; Pet. Br. 15. In that case, FERC argued and the D.C. Circuit held that a Section 401 certification was not triggered in the context of an *amendment* of an existing FERC license exclusively concerned with the proposed construction and operation of a pipeline that would withdraw water from a navigable water body for use as drinking water. It was only in that distinct context of an *amendment* to an existing license that FERC stated that Section 401 jurisdiction turned on whether the change in operation, rather than the entire facility, amounted to a discharge, and the D.C. Circuit agreed with FERC that the pipeline did not. *See* 112 F.3d at 1187. But where, as here, petitioner is seeking a *new* license upon expiration of an existing license and not an amendment, FERC made clear on remand in that same case that Section 401 jurisdiction considers the entire facility operation, including existing discharges to be continued in the future, and not just changes in the facility's operation. *See Va. Elec. & Power Co.*, 77 F.E.R.C. ¶ 61,138, 61,519 (1997). ("In a proceeding for a new license (relicense) of the project after the original license has expired, * * * the activity requiring certification is the continued operation of the project" and "[t]he place of discharge is the place at which the

3. EPA agrees. As the federal agency with primary responsibility for the Clean Water Act, EPA has spoken to the question presented before this Court on numerous occasions and in no uncertain terms. The Agency has consistently maintained in its many publications, including guidance documents and handbooks, that "licenses required for hydroelectric projects issued under the Federal Power Act" are among the federal permits and licenses "authorizing activities which may result in a discharge to the waters" and therefore are "subject to 401 certification."[31]

Notwithstanding petitioner's selective use of ellipsis (Pet. Br. 22), nothing in the recent EPA memorandum regarding the legal status of water transfers under the Clean Water Act is inconsistent with EPA's longstanding position regarding the scope of Section 401. *See* Pet. Br. 22 (quoting Memorandum from Ann R. Klee, EPA General Counsel, & Benjamin H. Grumbles, EPA Asst. Administrator for Water, to Regional Administrators, *Agency Interpretation in Applicability of Section 402 of the Clean Water Act to Water Transfers* (Aug. 5, 2005)). EPA clearly stated in that memorandum that the Agency was not addressing the status of dams under the Water Act. The memorandum expressly provides that "[t]his Agency

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project waters leave the project impoundment or bypass facilities and reenter the river"). Amicus Salt River Project Agric. Improv. & Power Dist., supporting petitioner, is therefore flatly wrong in contending (Amicus Br. 8) that the D.C. Circuit has "held that a 'discharge' under Section 401 of the CWA requires an 'addition' of a substance or substances into navigable waters."

[31] EPA Office of Wetlands Protection, *Wetlands and 401 Certification*, 20 (Apr. 1989); *see, e.g.*, EPA Office of Water, *Water Quality Standards Handbook* § 1.4 (2d 1994) ("Section 401 is intended to ensure that Federal permits and licenses comply with applicable water quality requirements, including State water quality standards, and applies to all Federal agencies that grant a license or permit," including "licenses required for hydroelectric projects issued under the Federal Power Act"); EPA Office of Wetlands Protection, *National Guidance: Water Quality Standards for Wetlands* § 6.1 (1990) ("Section 401 gives the States the authority to grant, deny, or condition certification of Federal permits or licenses (*e.g.* * * * Federal Energy Regulatory Commission licenses * * *) that may result in a discharge to 'waters of the U.S.'").

interpretation addresses only water transfers" and "the movement of water through a dam is not a water transfer because the dam merely conveys water from one location to another within the same water body." *Id.* at 18 & n.18.[32]

4. Representing the United States before this Court, the Solicitor General has maintained the same position. The government's brief in *PUD No.1* more than a decade ago asserted that the proposed hydroelectric facility in that case, which was, like petitioner's here, a run-of-the-river facility, would cause multiple distinct discharges, including a discharge "at the point where the water not needed to run the turbines is released at the dam itself." U.S. Amicus Br. Supporting Affirmance, *PUD No. 1*, at 14-15. "[W]hen the operator of the dam releases water through a crest-gate, sluice-gate, release valve, or other similar device, it has caused a discharge within the meaning of Section 401." *Id.* That the operation of the proposed facility might not "add" any "pollutants" to the river was of no moment, the United States explained, because "Congress employed the term 'discharge' when used without qualification (as in Section 401(a)) more broadly than the term 'discharge of any pollutant,' which is used in a number of other provisions of the CWA." *Id.* at 15 n.4 (citations omitted). While neither briefs filed by the United States nor EPA publications warrant "*Chevron*-style deference," *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), such "[c]ogent administrative interpretations * * * not [the] products of formal rulemaking * * * nevertheless warrant respect." *Alaska Dep't of Envtl Conservation v. EPA*, 540 U.S. 461, 488 (2004) (quoting *Wash. State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003)) (ellipsis in

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[32] The language that petitioner seizes is contained in a footnote parenthetical acknowledging nothing more than EPA's longstanding position that point source conveyances of water by dams do not require a Section 402 permit unless those conveyances also include pollutants. This case, however, does not involve the status of dams under Section 402, where there must be a "discharge of a pollutant," but under Section 401, where Congress required only "any discharge" to trigger its application.

original).

B. The Reliance Interests Created by Section 401's Plain Meaning Underscore the Illegitimacy of Petitioner's Request for Relief Securable only from Congress and not from the Courts

The States have long relied on the plain and well-settled meaning of Section 401 in pursuing the complex task of setting and achieving water quality standards for individual water bodies. In determining the appropriate water quality goals, and in allocating the burdens for achieving those goals among myriad dischargers, States seek to have hydropower projects shoulder their fair share.

Over the years, the hydropower industry, among others, has mounted several campaigns to persuade Congress to exempt them from compliance with Section 401.[33] Indeed, Congress is currently debating proposed amendments to Section 401 as it applies to federal permitting and licensing of oil refineries and pipelines. *See* 151 Cong. Rec. H8748 (daily ed. Oct. 7, 2005). Congress has yet to pass these proposals and we believe correctly so. But, whatever their individual merits, what is clear is that such legislative proposals represent the only legitimate way to achieve a change in the plain, settled meaning of a federal statute. *Cf. Morrison-Knudsen Constr. Co. v. Office of Workers Comp.*, 461 U.S. 624, 636 (1983) ("If these reasonable expectations are to be altered, that is a task for Congress * * * ").

More than 35 years ago, Maine's own Senator, Edmund Muskie, described the promise of the statutory language at issue in this case upon its initial congressional enactment in 1970: "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of [a] water quality standard." 116 Cong. Rec.

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[33] *See* Claudia Copeland, Cong. Res. Serv., *Clean Water Act Section 401: Background and Issues* (updated Oct. 1998) (describing attempts to exempt hydroelectric facilities from Section 401 in the wake of this Court's decision in *PUD No. 1*), *available at* http://www.ncseonline.org/nle/crsreports/water/h2o-3.cfm.

8984 (1970). The State of Maine and now the United States, including FERC, seek to honor that promise, now long overdue in its application to the Presumpscot River. The Court should allow them to do so.

CONCLUSION

The judgment of the Maine Supreme Judicial Court should be affirmed.

Respectfully submitted.

SEAN MAHONEY
VERRILL DANA, LLP
ONE PORTLAND SQUARE
PORTLAND, ME 04112

RONALD A. KREISMAN
25 PAGE STREET
HALLOWELL, ME 04347

RONALD A. SHEMS
SHEMS DUNKIEL KASSEL
& SAUNDERS PLLC
91 COLLEGE STREET
BURLINGTON, VT 05401

RICHARD J. LAZARUS*
GEORGETOWN UNIVERSITY
LAW CENTER
600 NEW JERSEY AVE., N.W.
WASHINGTON, D.C. 20001
(202) 662-9129

DANIEL H. SQUIRE
ETHAN G. SHENKMAN
ROBERT A. MAYS
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M STREET, N.W.
WASHINGTON, D.C. 20037

Counsel for Respondents

* *Counsel of Record*

JANUARY 2006

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Supreme Court, U.S.
FILED
JAN 6 - 2006

No. 04-1527

In The Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE BOARD OF ENVIRONMENTAL PROTECTION,

Respondent.

On Writ Of Certiorari To The Maine Supreme Judicial Court

BRIEF FOR RESPONDENT MAINE BOARD OF ENVIRONMENTAL PROTECTION

G. STEVEN ROWE
Attorney General

PAUL STERN
Deputy Attorney General

CAROL A. BLASI
Assistant Attorney General
(*Counsel of Record*)

GERALD D. REID
Assistant Attorney General

Six State House Station
Augusta, Maine 04333-0006
(207) 626-8582

Counsel for Respondent Maine Board of Environmental Protection

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the mere flow of the Presumpscot River through S.D. Warren Company's existing dams into the River below constitute "any discharge" under section 401 of the Clean Water Act?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
1. REGULATORY FRAMEWORK	2
2. THE PRESUMPSCOT RIVER	7
3. PROCEDURAL HISTORY	10
4. DECISION OF THE MAINE SUPREME JUDICIAL COURT	12
SUMMARY OF ARGUMENT	13
ARGUMENT	15
THE FLOW OF THE PRESUMPSCOT RIVER THROUGH AND OUT OF PETITIONER'S HYDROPOWER FACILITIES INTO THE RIVER BELOW IS "ANY DISCHARGE" UNDER SECTION 401 OF THE CLEAN WATER ACT	15
I. The Plain Language of the Clean Water Act Makes Clear that the Flow of Water Out of the Facilities Into the River Below is a Discharge under Section 401(a)	15
A. The language of sections 401 and 502(16) make plain that "any discharge" encompasses flows out of FERC-licensed dams	16
B. Petitioner's reading of the statute contravenes its plain meaning and established rules of construction	20

TABLE OF CONTENTS – Continued

Page

II. The Purposes and Structure of the Clean Water Act Reinforce the Plain Meaning that "Any Discharge" Does Not Require the Addition of Something From Outside of the Presumpscot River 23

A. The broad role reserved to the states "to prevent, reduce, and eliminate pollution" confirms that "any discharge" in section 401 is not limited by the definition of "discharge of pollutant," and encompasses flows of water through hydropower facilities 23

B. The conclusion that "any discharge" includes flows out of hydropower facilities is reflected in the structure of the CWA 26

1. Sections 401 and 402 27

2. Section 304(f)(2)(F) 28

3. Section 511(c)(2) 30

III. The Plain Meaning of the Statute is Fully Confirmed by the History and Evolution of the Clean Water Act 33

A. The 1970 Act 33

B. The 1972 Amendments 34

C. Congressional Acquiescence 37

IV. Federal Agencies Have Interpreted and Applied "Any Discharge" as Including Flows through Hydropower Facilities 38

CONCLUSION 42

APPENDIX A-1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alabama Rivers Alliance v. Federal Energy Regulatory Commission, 325 F.3d 290 (D.C. Cir. 2003) 21

Alaska Dep't of Envt'l Conservation v. Environmental Protection Agency, 540 U.S. 461 (2004) 39

American Rivers, Inc. v. Federal Energy Regulatory Commission, 129 F.3d 99 (2nd Cir. 1997) 32

Auer v. Robbins, 519 U.S. 452 (1997) 40

Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) 18, 21

Bob Jones Univ. v. United States, 461 U.S. 574 (1983) 37

California v. Federal Energy Regulatory Commission, 495 U.S. 490 (1990) 25

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001) 28

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 15, 38

Chickasaw Nation v. United States, 534 U.S. 84 (2001) 17, 20, 37

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) 37

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 16

Dubois v. United States Dep't of Agric., 102 F.3d 1273 (1st Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997) 23, 28

TABLE OF AUTHORITIES – Continued

Page

E. I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977) 25

Environmental Protection Agency v. California ex rel. State Water Resources Control Bd., 426 U.S. 200 (1976) 3

Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984) 7, 32

Gustafson v. Alloyd Co., Inc., 513 U.S. 561 (1995) 20

Hartford Underwriters Insurance Company v. Union Planters Bank, N.A., 530 U.S. 1 (2000) 16

Helvering v. Morgan's, Inc., 293 U.S. 121 (1934) 18, 20

John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank, 510 U.S. 86 (1993) 23, 26

Keating v. Federal Energy Regulatory Commission, 927 F.2d 616 (D.C. Cir. 1991) 24

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TABLE OF AUTHORITIES – Continued

Page

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Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177 (1941) 18

PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology, 511 U.S. 700 (1994) ..... *passim*

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 30

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 26

Russello v. United States, 464 U.S. 16 (1983) 18, 21, 33

S.D. Warren Co. v. Federal Energy Regulatory Commission, No. 04-1105 (D.C. Cir. 2005) 12

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 40

South Florida Water Management Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, *reh'g denied*, 541 U.S. 1057 (2004) ..... *passim*

Train v. City of New York, 420 U.S. 35 (1975) 2

United States v. Bean, 537 U.S. 71 (2002) 20

United States v. Gonzales, 520 U.S. 1 (1997) 16

United States v. Naftalin, 441 U.S. 768 (1979) 21, 22

United States v. New York Tel. Co., 434 U.S. 159 (1977) 18

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 18

Walton v. Cotton, 60 U.S. (19 How.) 355 (1856) 24

Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001) 19

TABLE OF AUTHORITIES – Continued

Page

STATE COURT CASE

Power Authority of the State of New York v. Williams, 475 N.Y.S.2d 901 (N.Y. App. Div. 1984) 19

AGENCY DECISIONS

Bangor Hydroelectric Company, 86 F.E.R.C. ¶ 62,242 (1999) 6

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TABLE OF AUTHORITIES – Continued

Page

S.D. Warren Co.
9 F.E.R.C. ¶ 62,603 (1979) 10
11 F.E.R.C. ¶ 62,111 (1980) 10
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16 F.E.R.C. ¶ 62,458 (1981) 10
105 F.E.R.C. ¶ 61,009 (2003) 11
105 F.E.R.C. ¶ 61,010 (2003) 11
105 F.E.R.C. ¶ 61,011 (2003) 11
105 F.E.R.C. ¶ 61,012 (2003) 11
105 F.E.R.C. ¶ 61,013 (2003) 11
Town of Madison, 81 F.E.R.C. ¶ 61,252 (1997) 56

FEDERAL STATUTES
16 U.S.C. §§ 791a *et seq.* 2
16 U.S.C. § 797 ..... 7, 8
16 U.S.C. § 808 8
16 U.S.C. § 808(a)(1) 7
16 U.S.C. § 808(e) 7
33 U.S.C. § 1251 ..... 1, 24
33 U.S.C. § 1251(a) 2
33 U.S.C. § 1251(b) 2, 36
33 U.S.C. §§ 1251 *et seq* 1
33 U.S.C. § 1311 ..... 3, 5

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. § 1313 ..... 1, 3
33 U.S.C. § 1313(c)(2)(A) 3
33 U.S.C. § 1314 ..... 3, 5, 29
33 U.S.C. § 1314(f)(2)(F) 1, 14, 24, 28
33 U.S.C. § 1341 ..... *passim*
33 U.S.C. § 1341(a)(1) 4
33 U.S.C. § 1341(d) 5, 25, 32
33 U.S.C. § 1342 ..... *passim*
33 U.S.C. § 1342(b) 6
33 U.S.C. § 1362 17
33 U.S.C. § 1362(6) 1, 2, 24
33 U.S.C. § 1362(12) ..... *passim*
33 U.S.C. § 1362(14) 1, 6, 29
33 U.S.C. § 1362(16) ..... *passim*
33 U.S.C. § 1362(19) 1, 2, 6, 24
33 U.S.C. § 1371(a) 1, 32
33 U.S.C. § 1371(c)(2) 1, 14, 30, 31
33 U.S.C. § 1371(c)(2)(A) 30
33 U.S.C. § 1371(c)(2)(B) 30
42 U.S.C. §§ 4321 *et seq.* 30

MAINE STATUTES

Me. Rev. Stat. Ann. tit. 38 §§ 464 *et seq.* 4

TABLE OF AUTHORITIES – Continued

Page

FEDERAL REGULATIONS

18 C.F.R. § 4.34(b)(5) 7, 41

18 C.F.R. § 16.2 7

18 C.F.R. § 16.8 ..... 7, 41

18 C.F.R. §§ 380.1 *et seq.* 32

40 C.F.R. §§ 131.1 *et seq.* 3

LEGISLATIVE HISTORY

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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STATUTES INVOLVED

The pertinent provisions of the Federal Water Pollution Control Act, commonly known as the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (CWA), are sections 101, 303, 304(f)(2)(F), 401, 402, 502(6), (12), (14), (16) and (19), and 511(a) and (c)(2), 33 U.S.C. §§ 1251, 1313, 1314(f)(2)(F), 1341, 1342, 1362(6), (12), (14), (16) and (19), and 1371(a) and (c)(2). Those not reproduced by Petitioner are set forth *infra* at A-1 to A-5.

STATEMENT OF THE CASE

On October 2, 2003, the Maine Board of Environmental Protection (BEP) affirmed an order of the Maine Department of Environmental Protection (DEP) issuing water quality certifications, pursuant to § 401 of the CWA, 33 U.S.C. § 1341, to Petitioner S.D. Warren Co. for the licensing by the Federal Energy Regulatory Commission (FERC) of five existing hydroelectric facilities on the Presumpscot River in Maine (the Facilities). Appendix to Petition for Writ of Certiorari (Pet. App.) A-35. The Facilities clearly induce pollution and prevent the attainment of water quality standards adopted by Maine and approved by the federal Environmental Protection Agency (EPA), pursuant to § 303, 33 U.S.C. § 1313, of the CWA, but do not specifically add pollutants to the River. Pet. App. A-42 – A-59, A-83 – A-139. The certifications contain conditions necessary to assure that the operations of the Facilities will comply with Maine's water quality standards, and FERC subsequently incorporated those conditions into its new licenses for the Facilities. *Id.* at A-121 – A-140. Petitioner challenged the authority of Maine to issue § 401 certifications for the operation of hydropower projects

licensed, pursuant to the Federal Power Act (FPA), 16 U.S.C. §§ 791a *et seq.*, arguing that the Facilities do not "result in any discharge into the navigable waters." The Maine Supreme Judicial Court (SJC) rejected that challenge. Pet. App. A-1.

1. REGULATORY FRAMEWORK. The Court is again asked to resolve a dispute over the role of the states in the "statutory and regulatory scheme that governs our Nation's waters, a scheme that implicates both federal and state administrative responsibilities." *PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994). The Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, established "a comprehensive program for controlling and abating water pollution." *Train v. City of New York*, 420 U.S. 35, 37 (1975). The statute was "designed 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'" and "to attain 'water quality which provides for the protection and propagation of fish, shellfish and wildlife.'" *PUD No. 1*, 511 U.S. at 704 (quoting 33 U.S.C. § 1251(a)).

In establishing this regulatory framework, Congress was careful to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," CWA § 101(b), 33 U.S.C. § 1251(b), and this broad role is reflected in both the CWA's definitions and its delineation of regulatory responsibilities. Congress broadly defined "pollution" to "mean[] the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water." CWA § 502(19), 33 U.S.C. § 1362(19). "Pollutant," however, is more narrowly defined to "mean[]" various listed materials and wastes as well as heat. CWA § 502(6), 33 U.S.C.

§ 1362(6). Therefore, the discharge of "pollutants" is one cause of "pollution," but does not cover all man-induced alterations of the water, such as in particular those generally related to the operation of dams.

The Administrator of the Environmental Protection Agency (EPA) must promulgate technology-based limitations on individual discharges of *pollutants* into navigable waters from point sources, pursuant to sections 301 and 304, 33 U.S.C. §§ 1311, 1314. A separate but complementary component of the CWA is found in § 303 dealing with the broader range of *pollution*, and requiring each State, subject to federal approval, to promulgate comprehensive water quality standards establishing water quality goals for all intrastate waters. 33 U.S.C. § 1313. These state water quality standards provide "a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *Environmental Protection Agency v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n.12 (1976). Section 303 water quality standards "shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act." 33 U.S.C. § 1313(c)(2)(A). Any such standards must take into account "their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also . . . their use and value for navigation." *Ibid*; 40 C.F.R. §§ 131.1 to 131.13. Acting in accordance with this mandate, in 1986, Maine revised and

strengthened its water quality standards to better protect its water resources.[1]

Pollutants and pollution are addressed by multilayered programs which are ultimately enforced through a variety of measures, including by § 401 certification and § 402 permits. State certification of federally-licensed activities "which may result in any discharge" was first established in § 21(b) of the Water Quality Improvement Act of 1970 (the 1970 Act), Pub. L. 91-224, § 103, 84 Stat. 91, 108.[2] In 1970, Congress did not include a definition of "discharge" for § 21(b). In 1972, Congress essentially reenacted § 21(b) as § 401(a)(1), 33 U.S.C. § 1341(a)(1), Pub. L. 92-500, 86 Stat. 816, 877. This provision addresses the broad range of pollution from federally-licensed facilities and is a primary mechanism for the states to attain water quality standards. Section 401(a)(1) presently requires that:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting

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[1] Maine Public Laws 1985, c. 698, § 15, now found as amended at Me. Rev. Stat. Ann. tit. 38, §§ 464 *et seq.* (West 2001 & Supp. 2005).

[2] Section 21(b) provided:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, . . . that there is reasonable assurance, as determined by the State or interstate agency that such activity will be conducted in a manner which will not violate applicable water quality standards.

> agency a certification from the State in which the discharge originates . . . that any such discharge will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307 of this Act.

In 1972, Congress provided in the CWA's definition section:

> The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

CWA § 502(16), 33 U.S.C. § 1362(16). A § 401 certification is required to set forth effluent and other limitations to assure that the Federal licensee complies with, *inter alia*, state water quality standards as well as "with any other appropriate requirement of State law"; such limitations "shall become a condition on any Federal license" and may be more stringent than those otherwise established by the EPA. CWA § 401(d), 33 U.S.C. § 1341(d); *see PUD No. 1*, 511 U.S. at 704-05, 711-14 (generally discussing § 401).

First enacted in 1972, § 402 deals exclusively with the discharge of *pollutants*. In order to enforce the technology-based limitations promulgated by the Administrator of the EPA under sections 301 and 304 noted above, § 402 established the National Pollutant Discharge Elimination System (NPDES) which requires "a permit for the discharge of any pollutant." 33 U.S.C. § 1342. "[D]ischarge of a pollutant" is specifically defined to "mean" the "*addition*" of any pollutant to navigable waters from a point source. CWA § 502(12), 33 U.S.C. § 1362(12) (emphasis added); *see South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 159, 162, *reh'g denied*, 541 U.S.

1057 (2004) (generally discussing NPDES program).[3] "[P]oint source" is defined to mean "any discernible, confined, and discrete conveyance," such as "any pipe, ditch, [or] channel." CWA, § 502(14), 33 U.S.C. § 1362(14). Section 402, therefore, creates a federal permit that is a subset of the array of federal licenses and permits requiring § 401 certification. A § 402 permit is fully subject to § 401 certification which, as noted above, can prescribe more stringent limitations on the "discharge of a pollutant" in order to attain the state's water quality standards. Operation of a dam generally does not involve the discharge of pollutants, thus not requiring a § 402 permit.

One category of federally licensed facilities that has long been subject to § 401 certification is hydropower projects.[4] Pursuant to the FPA, FERC issues licenses for hydropower projects on the nation's navigable waters. 16

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[3] The NPDES permitting process can, and generally has, been delegated to the states. CWA § 402(b), 33 U.S.C. § 1342(b). Maine has been delegated this responsibility over its non-Indian territory. *Approval of Application by Maine to Administer the National Pollutant Discharge Elimination System (NPDES) Program*, 68 F.R. 65052 (Nov. 18, 2003).

[4] Maine has issued § 401 water quality certifications for the operation of numerous preexisting dams not involving the discharge of pollutants. *See, e.g., Ridgewood Maine Hydro Partners, L.P.* (Damariscotta Mills), 105 F.E.R.C. ¶ 62,137 (2003); *FPL Energy Maine Hydro LLC* (Upper & Middle Dams Storage), 101 F.E.R.C. ¶ 62,179 (2002); *Bangor Hydroelectric Company* (Medway), 86 F.E.R.C. ¶ 62,242 (1999); *Bangor Hydroelectric Company* (Stillwater), 83 F.E.R.C. ¶ 61,038 (1998); *Town of Madison* (Sandy River), 81 F.E.R.C. ¶ 61,252 (1997); *Central Maine Power Company* (Fort Halifax), 81 F.E.R.C. ¶ 61,249 (1997); *Central Maine Power Company* (North Gorham), 65 F.E.R.C. ¶ 62,154 (1993); *Maine Public Service Company* (Aroostook), 65 F.E.R.C. ¶ 62,215 (1993); *Central Maine Power Company* (Cataract), 47 F.E.R.C. ¶ 62,296 (1989); *Great Northern Paper Company* (Mattaceunk), 44 F.E.R.C. ¶ 62,368 (1988).

U.S.C. § 797. FERC is authorized to issue new licenses for the continued operation of a dam, as it did for the Facilities here.[5] The new license may be issued for a term of up to fifty years "upon such terms and conditions as may be authorized or required under the then existing laws and regulations," 16 U.S.C. §§ 808(a)(1), 808(e), such as the CWA. FERC's regulations require that either a § 401 certification or evidence of waiver thereof be submitted for all license applications. 18 C.F.R. §§ 4.34(b)(5), 16.8. But for § 401, the states would have no control over the water quality impacts of federally licensed hydropower facilities.[6]

2. THE PRESUMPSCOT RIVER. The word *"presumpscot"* derives from an Abenaki word that means "Rough-places River."[7] The Presumpscot River originates at the outlet of Sebago Lake in southern Maine and flows southerly approximately 25 miles to the ocean. Joint

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[5] Under the FPA, licenses are required for both the original construction and operation of a dam, referred to as an "original" license, and for the continued operation of the dam after the original license expires, or a "new" license. 16 U.S.C. §§ 797, 808; 18 C.F.R. § 16.2. FERC has properly characterized the activities to be licensed here not as "the continuation of a preexisting discharge," but as "a new commitment of public resources for the term of the new license." *FPL Energy Maine Hydro LLC*, 111 F.E.R.C. ¶ 61,104 (2005).

[6] At certain points in Petitioner's brief, it suggests a conflict between the roles of FERC under the FPA and the states under § 401. Pet. Br. at 5-9. That issue, however, was the subject of Petitioner's second question in its petition for writ of *certiorari*, which the Court denied. In any case, there is no statutory language or legislative history exempting FERC licenses from § 401, and as discussed *infra*, the contrary is true. *See also, Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772-77 (1984) (Congress has created a multilayered approach, wherein other agencies have authority to insist on conditions in FERC licenses).

[7] Fannie Hardy Eckstorm, *Indian Place-Names of the Penobscot Valley and the Maine Coast* (University Press, 1960) (1941), at 159-60.

Appendix (J.A.) at 9. At one time, it teemed with thriving populations of anadromous fish, including Atlantic salmon, American shad and alewife. Pet. App. A-89. It no longer does so. *Ibid.*

The history of Maine is the history of dams, and these "rough-places" became the focal points of development and controversy with the arrival of Europeans. The dam at Presumpscot Falls, initially constructed in 1735,[8] is said to be the first dam built on the River, and the effects of that dam and others that soon followed were of immediate concern to the Native Americans and the new settlers. In 1739, for example, Chief Polin traveled to Boston to obtain a letter from Governor Belcher requiring the installation of a fish passage at the Presumpscot Falls dam.[9]

Eight dams are located on the Presumpscot River today. (*See* Map at J.A. at 9.) Five of them, owned and operated as hydroelectric facilities by Petitioner, are the subject of this appeal. From upstream to downstream they are Dundee, Gambo, Little Falls, Mallison, and Saccarappa. *Ibid.* The Facilities were constructed or converted to hydroelectric production in the early 1900s, and are located back-to-back on a stretch of the River approximately 12 miles in length. Pet. App. A-74 – A-77; J.A. 9. None presently has fish passage, so that each creates a barrier to such passage. Pet. App. A-89.

The Facilities operate continuously to generate electricity used at Petitioner's paper mill. The dams' mode

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[8] William Willis, *History of Portland* (Maine Historical Society, 1972) (1865), at 449.

[9] Maine Historical Society, *Collections*, 23 Doc. Series 257-62 (1916).

of operation is known as "run-of-river," but that term is somewhat inexact. Pet. App. A-77 – A-78. While the input into each impoundment approximately equals output, and the impoundments are maintained at near constant levels, the flow is in fact manipulated by the operator. *Final Environmental Impact Statement for Presumpscot River Projects*, SJC Record (R.) 174, at 11. Petitioner maximizes power generation by manually controlling the projects in response, in part, to flows released from an upstream hydroelectric project, not the subject of this case but also owned by Petitioner. *Ibid.*

Each Facility operates generally in the same manner. Each has a dam, with an impoundment behind it that stretches to the Facility immediately upstream. J.A. 10 – 17; Pet. App. A-74 – A-77. Each Facility operates by diverting water from the man-made impoundment into a man-made "power canal" (Pet. Br. at 3) and then through turbines, from which the water is released into a man-made tailrace and finally discharged into the next segment of the river channel. *Ibid.* The stretches of river from which the water is diverted are bypass reaches that in the past have received no flows except leakage through and around dam structures (e.g. gates, flashboards) and occasional spillage over the spillway. Pet. App. A-94; *Final Environmental Impact Statement for Presumpscot River Projects*, R. 174, at 76. The essentially dewatered bypass reaches range from 300 to 1075 feet in length. Pet. App. A-94.

The "Rough-places River" has been transformed into a series of impoundments in the 12 miles occupied by the Facilities. Pet. App. A-74 – A-77, A-108. As is the case with scores of dams in Maine and hundreds of dams across the country, there is no dispute that these Facilities do not

discharge "pollutants" as that term is defined in § 502(6) of the CWA, and therefore do not require permits under § 402. There is also no dispute that each of these Facilities, like almost all other hydropower projects, contribute to "pollution" as that term is defined under § 502(19) because each alters the chemical, physical and biological integrity of the water, causing the River to fail to meet water quality standards. Specifically, the Facilities do this by (1) "reducing natural reaeration, increasing time of travel, increasing water temperature, and creating settling basins for sediments and nutrients," thus depleting dissolved oxygen in the River; (2) rendering the water relatively useless for aquatic life in the essentially dewatered bypass reaches; (3) blocking passage of fish to their spawning and nursery waters; and (4) impeding recreational access to and use of the River. Pet. App. A-49, A-89, A-114 – A-115; Pet. Br. at 23-24.

3. PROCEDURAL HISTORY. The Facilities were first licensed by FERC between 1979 and 1981. Pet. App. A-2. At that time, Maine waived the requirement for water quality certification under § 401.[10] As noted above, Maine's water quality standards were substantially strengthened in 1986.

The FERC licenses were scheduled to expire on January 26, 2001. On January 22, 1999, Petitioner filed applications for new licenses with FERC. As with other, similar projects in Maine and around the nation, FERC required § 401 certifications for the Facilities. SJC Appendix,

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[10] *S.D. Warren Orders*, 16 F.E.R.C. ¶ 62,458 (1981); 11 F.E.R.C. ¶ 62,285 (1980); 11 F.E.R.C. ¶ 62,150 (1980); 11 F.E.R.C. ¶ 62,111 (1980); 9 F.E.R.C. ¶ 62,603 (1979).

at 119, 238. Petitioner applied for certifications from Maine, but took the position that none were required. Petitioner's application proposed, *inter alia*, increased stream flows into the bypass reaches at three of the dams but did not propose any fish passage facilities. Pet. App. A-78 – A-82, A-94.

On April 30, 2003, the DEP issued an order approving § 401 water quality certifications with conditions for the operation of Petitioner's Facilities. Pet. App. A-121 – A-140. Petitioner appealed the certifications to the BEP, which, on October 2, 2003, following *de novo* review, affirmed DEP's order. Pet. App. A-35 – A-73. These conditions include minimum flows at three of the Facilities into the bypass reaches greater than those proposed by Petitioner, additional spillage at two of the Facilities to increase dissolved oxygen, a contingent phased implementation for fish passage on the five dams to permit sea-run fish to access their natural spawning and nursery waters, and recreational access requirements. Pet. App. A-53 – A-54, A-121 – A-139. All of these conditions were necessary to assure compliance with the State's water quality standards approved by the EPA. Pet. App. A-83 – A-117.

Petitioner appealed the BEP's order to the Maine Superior Court (Pet. App. A-19), and then to the Maine Supreme Judicial Court (Pet. App. A-1). Both courts affirmed.

Applying § 401, FERC issued 40-year licenses for these Facilities, incorporating all conditions of Maine's certifications. *S.D. Warren Co.*, 105 F.E.R.C. ¶¶ 61,009 to 61,013 (2003). Petitioner appealed FERC's licensing orders to the Court of Appeals for the District of Columbia Circuit. That appeal did not challenge the need for § 401

certification. The court denied the petition for review on May 6, 2005. *S.D. Warren Co. v. Federal Energy Regulatory Commission*, No. 04-1105 (D.C. Cir., filed May 6, 2005).[11]

4. DECISION OF THE MAINE SUPREME JUDICIAL COURT. Utilizing an analysis not proffered by the BEP, the SJC found that an "'addition' is the fundamental characteristic of any discharge" because "discharge of pollutants" means any *addition* of pollutants, and "discharge of pollutants" is included in the definition of "discharge." Pet. App. A-6. The SJC went on to conclude that waters that run through the turbines lose their status as waters of the United States, and therefore are an "addition" when they return to the river. Pet. App. A-8, A-10. The SJC rejected Petitioner's argument that "discharge" is limited to "discharge of pollutants." Pet. App. A-8. The SJC, agreeing with the BEP, reasoned that the use of the word "includes" in the definition of "discharge" in § 502(16) as that term is utilized in § 401 "must be given its plain meaning. The common meaning of the word *includes* does not suggest it is a word of limitation." Pet. App. at A-9 (emphasis in original). The SJC concluded that "any discharge from a dam, whether polluting or not, is a 'discharge' for purposes of section 401(a)(1)." Pet. App. at A-8. The SJC did not discuss *Miccosukee*.

[11] Petitioner filed no petition for writ of certiorari regarding this denial.

SUMMARY OF ARGUMENT

The flow of water through dams is a discharge triggering § 401 review under the plain language of the CWA. "[A]ny discharge" under § 401 occurs when water, wherever it came from and whatever is in it, is *discharged* – that is, is emitted or flows – from the operation of a federally licensed facility into the navigable waters of the United States. The expansive words used in § 401(a)(1) mean what they plainly say, and there is no dispute that in fact water is emitted from the operation of these Facilities into navigable waters.

Section 502(16) provides that "discharge" "includes" "discharge of pollutants." The use of the word "includes" intends that the latter is simply a subset of, not a limitation on, the former. When Congress enacted two separate definitions – "discharge" and "discharge of pollutants" – Congress ascribed different meanings to the different definitions and did not enact redundant provisions whereby the two terms are simply coextensive. Moreover, Congress did not use the word "addition" to generally qualify "discharge," although in the same enactment in the same definitional section Congress used "addition" to define "discharge of pollutants." Thus, the concept of "addition" is not a limitation on the scope of "discharge."

Although the SJC properly found that "discharge" under § 401 is not limited to a discharge of "pollutants" and reached the correct result, the SJC's importation of notions of "addition" was erroneous. The BEP does not rely upon the SJC's "addition" reasoning for the affirmation of the BEP's assertion of § 401 authority over the Facilities.

Petitioner's theory is that a state lacks the authority to issue a § 401 certification because the flows from the

dam do not involve an "addition" of a "pollutant" or "something like" it. Pet. Br. at 34. Petitioner relies on the definition of "discharge of pollutant," as used in § 402, and cases construing it, including this Court's decision in *Miccosukee*. Section 401 on its face, however, covers a broader range of water quality impacts than § 402, and nothing in *Miccosukee* is to the contrary. Petitioner has not provided any support, either in the statute, or judicial or administrative interpretation thereof, for its overly narrow interpretation of § 401. Petitioner's reliance on sections 304(f)(2)(F) and 511(c)(2) is misplaced. The former simply mandates information-sharing by the EPA with the states, and the latter prevents review under the National Environmental Policy Act (NEPA) of CWA limitations dealing only with *pollutants*. Neither provision on its face or as intended exempts hydropower facilities from § 401 certification.

The purpose of the CWA, to restore the chemical, physical, and biological integrity of the Nation's waters, is furthered by BEP's interpretation, and seriously undermined by that of Petitioner. The hundreds of dams that are subject to FERC licensing but do not "add" "pollutants" are not covered by § 402, and therefore, under Petitioner's theory, would become exempt from the regulatory reach of the CWA, a result clearly at odds with the expressed intent of Congress to eliminate water pollution in all of its forms. The plain result of Petitioner's argument is that the states' primary role in reducing the effects of non-pollutant water pollution would be eliminated with respect to hydropower facilities, requiring the burden of attainment of water quality standards to be placed on other river dischargers.

The legislative record further demonstrates that § 401 was intended to cover FERC licenses generally and hydropower projects specifically. In contrast, the legislative record is barren of any hint that Congress intended certification to be limited to activities that involved the discharge of pollutants or "something like" pollutants.

Finally, EPA, FERC and even the hydropower industry have all interpreted "any discharge" in § 401 to include the flow of water through dams. Be it full *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), deference or persuasive respect, the EPA's interpretation of § 401 is compelling of the conclusion that the relicensing of dams through which water is discharged into navigable waters requires state certification under § 401.

ARGUMENT

THE FLOW OF THE PRESUMPSCOT RIVER THROUGH AND OUT OF PETITIONER'S HYDROPOWER FACILITIES INTO THE RIVER BELOW IS "ANY DISCHARGE" UNDER SECTION 401 OF THE CLEAN WATER ACT.

I. The Plain Language of the Clean Water Act Makes Clear that the Flow of Water Out of the Facilities Into the River Below is a Discharge under Section 401(a).

Section 401 on its face covers the broad array of federally licensed activities that affect a state's water quality standards, including dams. Limiting the broad reach of § 401 to those permits that involve a "discharge of pollutants" or "something like" pollutants finds no support in the words of the CWA. When interpreting a statute, the

Court "begin[s] with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)).

A. The language of sections 401 and 502(16) make plain that "any discharge" encompasses flows out of FERC-licensed dams.

The operative statutory clause of § 401(a)(1) – "any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters" – is written in the most broad and expansive of terms. "[A]ny activity" encompasses the full panoply of human endeavor, and there can be no reasonable dispute that the operations of the Facilities are federally licensed "activit[ies]" within the ambit of § 401(a)(1). "[M]ay result in" utilizes the permissive "may" which is "used to express possibility," Random House Unabridged Dictionary 1189 (2d ed. 1987), rather than "will," and therefore plainly covers "any activit[ies]" that have the chance of a discharge.

"[A]ny discharge" could not be more broadly written. The plain meaning of "any" is "one or more without specification or identification," "every," or "all." Random House Unabridged Dictionary 96 (2d ed. 1987); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'").

"Discharge" in § 502(16) is broadly described "when used without qualification" as "includ[ing]" "discharge of

pollutants," without any limitation. "The term 'discharge' is not defined in the CWA, but its plain and ordinary meaning suggests 'a flowing or issuing out,' or 'something that is emitted.'" *PUD No. 1*, 511 U.S. at 725 (Thomas, J., dissenting) (quoting Webster's Ninth New Collegiate Dictionary 360 (1991)). This "plain and ordinary meaning" encompasses anything emitted during the operation of the Facilities so long as it flows into navigable waters, whether or not the "discharge" is considered to be the waters of the Presumpscot River before or during the "emitting," and whether or not the "discharge" contains "pollutants" or "something like" them from the outside world. That is the clear, unlimited connotation of "*any* discharge." Simply put, under the language of sections 401 and 502(16), it does not matter where the water comes from before it pours forth from the "activity." There is no dispute that water is in fact emitted from – that is, discharged by – each Facility into navigable waters.[12]

The plain meaning of the words is that "discharge of pollutants" is a subset of "discharge," and the former does not circumscribe the latter. Congress employed "means" for every one of the 23 definitions listed in § 502, except the definition of "discharge" where it used the term "includes." 33 U.S.C. § 1362. "To 'include' is to 'contain' or 'comprise as part of a whole.'" *Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001) (quoting Webster's Ninth New Collegiate Dictionary 609 (1985)). "The natural

[12] Water must flow through the projects' turbines and be "discharged into" the river at the end of the tailrace in order for the project to produce electricity. Similarly, water is "discharged into" the river from other mechanisms associated with the dams, permitting their proper functioning, such as spillways and sluice-gates.

distinction would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition." *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125-126 n.1 (1934); *see also United States v. New York Tel. Co.*, 434 U.S. 159, 169 n.15 (1977) ("Where the definition of a term . . . was intended to be all inclusive, it is introduced by the phrase 'to mean' rather than 'to include'"). The phrase following "including" does not limit the function before it. *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 189 (1941).

The use of "includes" rather than "means" is significant. "[W]hen 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (citations omitted)); *see* 2A Norman Singer, Statutes and Statutory Construction ("Singer"), § 46:06, at 192 (6th ed. 2000). Congress used the word "means" in all other definitions including "discharge of pollutants" but not in the definition of "discharge" – a difference in phrasing that must be presumed to have been done "intentionally" and "purposefully."

Section 401's requirement that the discharge be "into" navigable waters is a jurisdictional necessity to link the regulatory scheme to the Commerce Clause powers of Congress. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (generally discussing scope of "navigable waters.") The use of this simple preposition has no other significance, and certainly cannot be construed as

harboring a hidden exemption for hydropower projects from § 401, as Petitioner suggests – for Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Indeed, Petitioner's own description of the operation of each Facility – that water from the Facilities is "channeled" "back *into* the riverbed" – only supports this conclusion. Pet. Br. at 3 (emphasis added).

Given this expansive plain language, it is not surprising that this Court and both parties in *PUD No. 1* agreed that hydropower facilities require § 401 certifications. The Court stated:

> There is no dispute that petitioners were required to obtain a certification from the State pursuant to § 401. Petitioners concede that, at a minimum, the [hydropower] project will result in two possible discharges – the release of dredged and fill material during the construction of the project, and *the discharge of water at the end of the tailrace after the water has been used to generate electricity.*

511 U.S. at 711 (emphasis added).[13]

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[13] Because it has been understood that hydropower facilities require § 401 certification, there is limited discussion of this issue in the lower courts. *See Oregon Natural Desert Association. v. Dombeck*, 172 F.3d 1092 (9th Cir. 1998), *cert. denied*, 528 U.S. 964 (1999) (finding that "discharge" as defined in § 502(16) was broader than "discharge of pollutants," but only included discharges from point sources, and stating in *dicta* that water released from the tailrace at dams is such a point source); *National Wildlife Federation v. Federal Energy Regulatory Commission*, 912 F.2d 1471, 1484 (D.C. Cir. 1990) ("discharge" for purposes of § 401 occurred "at the dam, where the flow of water would be blocked and consequently the water would be backed up"); *Power Authority of the State of New York v. Williams*, 475 N.Y.S. 2d 901, 904

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B. Petitioner's reading of the statute contravenes its plain meaning and established rules of construction.

Despite the two separate definitions for "discharge" and "discharge of pollutant," Petitioner argues they mean, or in its words "equate" to, the same thing. Pet. Br. at 15. On the contrary, "courts do not construe different terms within a statute to embody the same meaning." 2A Singer, § 46:06, at 193-94; *see also, United States v. Bean*, 537 U.S. 71, 76 n.4 (2002). Where, as here, both terms are used in a definitional section, the use of them to convey a different sense "seems clear." *Helvering*, 293 U.S. at 125-126 n.1.

Moreover, courts "will avoid a reading which renders some words altogether redundant." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574 (1995). Every word and clause is given effect if possible. *Chickasaw Nation*, 534 U.S. at 93. Petitioner's argument renders "discharge" when used "without qualification" to be wholly redundant of and the legal equivalent to "discharge of pollutant."[14] This result defeats the drafters' expressed emphasis on the particular importance of the law's definitions.[15]

(N.Y. App. Div. 1984) ("discharge" in § 401 "includes" and is broader than "discharge of pollutant.").

[14] Petitioner also relies upon the rule of *noscitur a sociis* – a "word is known by the company it keeps." Pet. Br. at 16-17. The application of that rule to this case is explained away by one of the decisions Petitioner relies upon, wherein the Court cautioned against a reading which "renders some words altogether redundant." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574 (1995).

[15] "[I]t is necessary to recognize that certain terms used in the drafting . . . have very specific and technical meanings. The definitions of these terms are included in section 502 . . . and it is recommended that very special attention be accorded to section 502." H.Rep. No. 92-911 at

(Continued on following page)

If Congress had intended to limit "discharge" to "additions" of "pollutants,"[16] it presumably would have done so as it did in the nearby paragraph within the same section of the same enactment by simply writing in the word "addition." By not including "addition" as a general limitation on all "discharges" in § 502(16), Congress cannot be presumed to have intended to include it. *Barnhart v. Sigmon Coal Co.*, 534 U.S. at 452. Courts decline invitations to read a restrictive or limiting term – here "addition" – found in one provision into a section where Congress did not use that term. *See Russello*, 464 U.S. at 23; *United States v. Naftalin*, 441 U.S. 768, 772-773 (1979).

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75 (1972), *reprinted in* 1 *Legislative History of the Water Pollution Control Act Amendments of 1972* (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-1 ("*Legis. Hist.*") at 762. The drafters of the CWA specifically warned that "[t]o revise [the definitions] in a way so as to limit their coverage is to severely detract from the effectiveness of the bill." House Debate on H.R. 11896, March 27, 1972, 1 *Legis. Hist.* 356 (Statement of Rep. Blatnik, Chairman of the House Committee on Public Works).

[16] It should be noted that the importation of the concept of "addition" into § 401 appears to find its origin in two lower court cases that did not in fact involve the issue before this Court but rather the issue of whether a § 401 certification was required to amend an existing FERC license when the discharge changed. *Alabama Rivers Alliance v. Federal Energy Regulatory Commission*, 325 F.3d 290, 292 (D.C. Cir. 2003); *North Carolina v. Federal Energy Regulatory Commission*, 112 F.3d 1175, 1187 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998). Indeed, in *North Carolina* the parties apparently agreed that the project would require § 401 certification upon relicensing. 112 F.3d at 1195 (J. Wald, dissenting). In any event, neither case provided any detailed analysis dealing with the plain meaning, purpose, structure or legislative history of this provision, and in both cases the court assumed that water itself, regardless of pollutants, could be an "addition."

The language "any discharge" first appeared in § 21(b) of the 1970 Act. It was not until 1972 that Congress first incorporated the concept of "addition" into § 402 through the definition of "discharge of pollutant." Congress chose not to change the scope of state certification when it reenacted § 21(b) from the 1970 Act as § 401. To achieve the aim sought by Petitioner, in 1972 Congress easily could have written § 401 to read "may result in a discharge *of pollutants*" or even drafted § 502(16) to read that "'discharge' *means* the discharge of pollutants *or the addition of any other material.*" But "[t]he short answer is that Congress did not write the statute that way." *Naftalin*, 441 U.S. at 773. The fact that Congress did not do so is strong evidence of contrary intent. *Ibid.*

Petitioner suggests that BEP's reading of the statute results in an absurdity because "a river flowing through a dam" cannot be "a river 'discharging into' itself." Pet. Br. at 17. Of course, the Presumpscot is not simply discharging into itself; the water flows into each Facility – including its impoundment, power canal, turbines and tailrace – out of which the water is emitted, *i.e.* is discharged, "into" the River. Petitioner chooses to ignore the nature of the "flowing" process, which is interrupted by the Facilities' use and pollution of the water.

Petitioner can find no comfort in the soup-and-ladle analogy of *Miccosukee*: "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it *back into* the pot, one has not 'added' soup or anything else to the pot." 541 U.S. at 110 (citation omitted) (emphasis added). Because, according to Petitioner, the operation of a Facility "channel[s]" the water "back into" the River (Pet. Br. at 3), under the plain meaning of "any discharge," this activity is covered by § 401. Whether "soup or anything else" has

been "added" to the River may be relevant to NPDES coverage under *Miccosuskee*, which construes only the scope of the NPDES permit requirements of § 402, but not to state certification under § 401.

The SJC's importation of "addition" into "discharge" and § 401, therefore, was erroneous, and the SJC's loss-of-status reasoning to find an "addition" was unnecessary.[17] The CWA renders the status of the water as it enters, is used by and then is discharged from the Facilities irrelevant to § 401 certification, so long as that discharge is emitted into navigable waters.

II. The Purposes and Structure of the Clean Water Act Reinforce the Plain Meaning that "Any Discharge" Does Not Require the Addition of Something From Outside of the Presumpscot River.

A. The broad role reserved to the states "to prevent, reduce, and eliminate pollution" confirms that "any discharge" in section 401 is not limited by the definition of "discharge of pollutant," and encompasses flows of water through hydropower facilities.

A statute should be interpreted so that its manifest purpose, policy or object can be accomplished. *John Hancock Mut. Life. Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 94 (1993); 3 Singer, § 58.6, at 107. If two reasonable constructions are possible, one that will carry

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[17] *But see Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1297 (1st Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997) (when "water leaves the domain of nature and is subject to private control rather than purely natural processes . . . it has lost its status as waters of the United States.").

out and the other defeat the object of the statute, the former construction prevails. 2A Singer, § 46.05, at 174-75 (footnote omitted); *see also Walton v. Cotton*, 60 U.S. (19 How.) 355, 358 (1856).

Congress intended the CWA to comprehensively prevent, reduce and eliminate water *pollution* in all its forms and to preserve the states' responsibilities and rights to do so within their bounds. CWA § 101, 33 U.S.C. § 1251. "Pollution" could not be more broadly defined – any "man-made or man-induced alteration" of the "integrity of water." CWA § 502(19), 33 U.S.C. § 1362(19). The CWA "expressly recognizes that water 'pollution' may result from 'changes in the movement, flow, or circulation of any navigable waters . . . including changes caused by the construction of dams.'" *PUD 1*, 511 U.S. at 719-20 (quoting 33 U.S.C. § 1314(f)(2)(F)). The states are the "prime bulwark in the effort to abate water *pollution*," and "[o]ne of the primary mechanisms through which the States may assert the broad authority reserved to them is the certification requirement set out in section 401 of the Act." *Keating v. Federal Energy Regulatory Commission*, 927 F.2d 616, 622 (D.C. Cir. 1991) (citation omitted) (emphasis added). The discharge of "pollutants," defined to mean certain material as well as heat, clearly does not include all man-induced alterations such as the lowering of dissolved oxygen by impoundment. *Compare* CWA § 502(6) *with* § 502(19), 33 U.S.C. §§ 1362(6) and (19). The discharge of *pollutants* is thus a subset within the broader problem of *pollution*.

The operation of dams affects water quality by obstructing the river and thereby creating or contributing to pollution (*see* Pet. Br. at 23), but not by the addition of pollutants requiring a NPDES permit under § 402. "[A]ny

discharge" must be understood to include the discharge of flows through hydropower facilities, regardless of the "addition" of pollutants or, in Petitioner's words, "something like" them (Pet. Br. at 34). Otherwise, FERC-licensed dams would be outside any regulatory authority under the CWA, and in particular outside the states' authority to enforce their water quality standards. *California v. Federal Energy Regulatory Commission*, 495 U.S. 490 (1990).

Congress should not be presumed to have failed to provide the responsible governmental entity – here the state – "with the authority needed to achieve the statutory goals." *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 133 (1977). This is particularly so where Congress has created a legislative scheme where the federal and state governments are pursuing a "common purpose" to protect the public health. *Pharmaceutical Research & Mfrs. of America v. Walsh*, 538 U.S. 644, 666 (2003).

Moreover, reducing the broad concept of "discharge" to the narrower concept of "discharge of pollutants" would render § 401 internally inconsistent. In *PUD No. 1*, the Court held that the states' conditioning authority under § 401 extended to measures that would protect designated uses, including the establishment of minimum flows for the protection of fish. 511 U.S. at 719-21. It would make no sense for Congress to require the States to establish such designated uses of their waters, give them broad conditioning authority under § 401(d) to protect those uses, and then restrict the use of this authority to the limited range of facilities that discharge pollutants.

If Petitioner were to be correct, the burden to attain water quality standards after years of being shared would

now suddenly fall on the other users of the River, upsetting long-held expectations[18] and presenting serious practical difficulties. Petitioner's Facilities – and hundreds of dams like them – indisputably create pollution and contribute to the non-attainment of water quality standards. An exemption for hydropower facilities would produce harsh results for other users of the River, such as municipal treatment plants and industrial facilities. To attain standards, states would be forced to impose more stringent limits on other users in order to account not only for their own impacts but for those of exempt dams. This inequitable result is not contemplated anywhere in the CWA and should not be lightly inferred.

B. The conclusion that "any discharge" includes flows out of hydropower facilities is reflected in the structure of the CWA.

The Court also examines the statutory scheme to ensure the disputed provision is interpreted in a manner consistent with other parts of the statute. *John Hancock Mut. Life*, 510 U.S. at 94; *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41 (1997); 2A Singer, § 46:05, at 154. Not only does BEP's interpretation of sections 401 and 502(16)

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[18] Indeed, at least one of the *amici* supporting Petitioner has expressed its understanding to Congress that § 401 applies to hydropower projects. *See, e.g.*, Capitol Hill Hearing Testimony, Fed. Doc. Clearing House Cong. Testimony (Aug. 5, 1993) (Testimony of Roger Woodworth, National Hydropower Assoc., on Reauthorization of the Federal Water Pollution Control Act before Senate Subcommittee on Clean Water, Fisheries and Wildlife) ("Although hydropower introduces no pollutants into our waterways," it is "subject to . . . the Section 401 water quality certification process."), *available in* LEXIS, U.S. Congress Library, Committee Hearing Transcripts.

further the objectives of the CWA as discussed above, but it is fully consistent with the structure and other provisions of that Act. By contrast, Petitioner's suggested theory leaves a gap in the regulatory framework of the CWA.

1. Sections 401 and 402. Sections 401 and 402 are different provisions serving different functions. Section 402 was added in 1972 to implement a system of permits for nationwide minimum effluent limitations on the discharge of pollutants. Section 402 on its face deals only with actual *additions of pollutants*. On the other hand, § 401, retained from § 21(b) of the 1970 Act, operates to allow a state to protect navigable waters from *pollution* by regulating any and all discharges from any federally-licensed activities in conformance with the full spectrum of CWA requirements, and, in particular, to allow a state to attain its water quality standards. Specifically, the operation of hydropower projects results in man-induced alteration of the water (Pet. Br. at 23-24), and § 401 is the tool the state has to control the effects of those alterations on its water quality. Section 402 does not address such dam pollution and Petitioner nowhere suggests it does.

Petitioner's primary argument is that "discharge" under § 401 should be read the same way "discharge of pollutants" was interpreted under § 402 by this Court in *Miccosukee*. This argument disregards the separate functions sections 401 and 402 play in the comprehensive scheme established by the CWA. Nothing in *Miccosukee* hints that "discharge" "equate[s]" to "discharge of pollutants." That case dealt exclusively with § 402 and the meaning of "addition" as utilized in the definition of "discharge of

pollutants," not § 401 or the scope of "discharge" as used therein.[19] Just as "discharge of pollutants" is a subset of "discharge," certifications issued in connection with pollutant discharge permits under § 402 are a subset of the array of certifications the states are authorized to issue under § 401.

2. Section 304(f)(2)(F). Section 304 requires EPA to provide information to governmental agencies, including the states, to use in the exercise of their regulatory authority.[20] This Court in *PUD No. 1*, viewed § 304(f)(2)(F) as recognizing that dams cause "pollution" by their effect on "the movement, flow, or circulation of any navigable waters," without any reference to *pollutants*. 511 U.S. at 719-720.

Petitioner argues, however, that the discussion of dams in § 304 is incompatible with the states' assertion of certification authority over dams under § 401. Pet. Br. at 23-25. On the contrary, this Court has already explicitly

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[19] Similarly, Petitioner's reliance on lower court decisions dealing with § 402 is misplaced. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001) (transfer of pollutants is an addition under § 402); *Dubois*, 102 F.3d at 1299 (transfer of water from a river to a pond is an addition under § 402); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 585 (6th Cir. 1988) (release of water from a dam containing entrained fish does not constitute the addition of a pollutant under § 402); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (§ 402 permit not required for dam-induced pollution).

[20] Section 304(f)(2)(F) requires the EPA to provide governmental agencies, including states, with information regarding "processes, procedures, and methods to control pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters . . . including changes caused by the construction of dams." 33 U.S.C. § 1314(f)(2)(F).

held that the pollution described in § 304(f)(2)(F) was properly the subject of the states' § 401 conditioning authority. *PUD No. 1*, 511 U.S. at 719-20. There is no language in § 304 that suggests that dams are exempt from § 401. Section 304(f)(2) on its face directs EPA to supply the states the information they need to exercise their regulatory responsibilities, including under § 401, and does not purport to limit § 401 authority. Section 304 is therefore informational only, and the CWA provides no mechanism other than § 401 for states to regulate the operation of FERC-licensed dams.

Petitioner further suggests that dam-caused pollution described in § 304(f)(2)(F) is non-point source pollution and should be addressed through the CWA's non-point source controls rather than § 401 certification. Pet. Br. 24-25. To the extent the "point source" – "non-point source" distinction informs this discussion at all, *see* Pet. Br. at 15, these Facilities are point sources under § 502(14), 33 U.S.C. § 1362(14), because they clearly are "discrete conveyance[s]" of water. *See Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998) (distinguishing non-point runoff from a release of water through a dam's tailrace which would involve a "conveyance" and is therefore a "point source"); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165, 182 (D.C. Cir. 1982) (a dam's pipes or spillways fall within the definition of point source); *cf. Miccosukee*, 541 U.S. at 106 (sources listed in § 304(f)(2)(F) may fall within the definition of "point source"). Nothing in § 304 describes changes in flows as "non-point source" pollution, and Petitioner's own description of these Facilities as conveying water by means of a "canal" and "channel" (Pet. Br. at 3-4), acknowledges these Facilities to be "point sources."

3. Section 511(c)(2). The National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (NEPA), is a procedural mandate that requires "a federal agency contemplating a major action [to] prepare . . . an environmental impact statement . . . [to] ensure[] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Section 511(c)(2) of the CWA addresses one narrow aspect of NEPA review. It provides that NEPA does not authorize a federal agency to alter the controls imposed on the "discharge of a pollutant" in a NPDES permit or a state § 401 certification.[21] Its manifest purpose is to clarify that federal agencies may not use NEPA to act in an area – the establishment of effluent limitations and other limits on the "discharge of pollutants" – that Congress intended to be within the sole authority of EPA and state environmental agencies.[22]

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[21] Section 511(c)(2)(A) provides that NEPA does not authorize other federal agencies that issue licenses that may result in the discharge of pollutants to engage in NEPA review of "any effluent limitation or other requirement established pursuant to [the CWA] or the adequacy of any certification under" § 401. 33 U.S.C. § 1371(c)(2)(A). Section 511(c)(2)(B) establishes that NEPA does not allow a federal agency to impose "any effluent limitation other than any such limitation established under" the CWA. 33 U.S.C. § 1371(c)(2)(B).

[22] Nonetheless, as explained by Senator Muskie, "nothing in section 511(c)(2) should in any way be construed to discharge any Federal licensing or permitting agency . . . from its full range of NEPA obligations to make a systematic balancing," only that for the purposes of that balancing, federal agencies must accept effluent limitations established by EPA or the states, under § 401. Prepared comments of Senator Muskie, Exhibit 1 (Oct. 4, 1972), 1 *Legis. Hist.* 183.

Petitioner argues that the use of the term "discharge of a pollutant" in § 511(c)(2), rather than "any discharge," shows that Congress assumed that § 401 certification authority was limited to the discharge of pollutants. Pet. Br. at 25. Petitioner asserts that the purpose of § 511(c)(2) is to avoid "duplicative review" under NEPA of certified activities, and that this purpose would not be accomplished if activities involving a "discharge of a pollutant" did not make up the entire universe of activities covered under § 401. Pet. Br. at 27-28. This strained argument ignores the evident meaning and effect of § 511(c)(2).

While the purpose of § 511(c)(2) may have been to prevent duplication, it is only targeted at a limited area that Congress sought to assign to the sole authority of EPA and the states, namely controls on the discharge of pollutants. This is evidenced in the legislative history of § 511(c)(2):

> EPA is the sole Federal agency specifically charged with comprehensive responsibility to regulate the discharge of pollutants . . . [other] agencies shall accept as dispositive the determinations of EPA and the States (under Section 401 . . .).

Comments of Senator Muskie, Exhibit 1 (Oct. 4, 1972), reprinted in 1 *Legislative History of the Water Pollution Control Act Amendments of 1972* (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-1 ("*Legis. Hist.*") 183. Section 511(c)(2) does not speak to (and, thus, does not limit) other statutes that may address water quality impacts, such as the FPA. Thus, the authority of federal agencies is left intact with regard to areas that are properly within their statutory mandates, including "pollution"

caused by factors other than the "discharge of a pollutant."[23] When read fairly, this section evinces the reasonable legislative intent to leave undisturbed those statutory requirements, as well as the procedural requirements of NEPA, insofar as they address non-pollutant water quality issues that also may be of concern to a state acting under § 401. This is not duplicative of the state certification process, as Petitioner claims, as it involves the application of wholly separate statutory regimes and their separate purposes.[24] Rather, it is the type of multilayered approach towards pollution envisioned by Congress. *See Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772-77 (1984).[25]

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[23] Federal agencies must nonetheless incorporate the conditions of a state-issued certification in any license or permit, 33 U.S.C. § 1341(d), and cannot review the substance of state-imposed certification conditions, *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 107-112 (2nd Cir. 1997). Nothing in § 401 or § 511, however, prevents a federal agency from requiring more stringent controls on discharges, other than discharges of pollutants, as long as they are not inconsistent with the CWA, including a water quality certification. 33 U.S.C. § 1371(a).

[24] This has also been the understanding of the hydropower industry. *See, e.g.*, Capitol Hill Hearing Testimony, Fed. Doc. Clearing House Cong. Testimony (August 5, 1993) (Testimony of Roger Woodworth, National Hydropower Assoc., on Reauthorization of the Federal Water Pollution Control Act before Senate Subcommittee on Clean Water, Fisheries and Wildlife) ("water quality certification review serves to supplement the comprehensive review of any proposed new or existing project conducted by FERC under" NEPA), *available in* LEXIS, U.S. Congress Library, Committee Hearing Transcripts.

[25] It is no surprise, therefore, that FERC's regulations call for NEPA review, 18 C.F.R. §§ 380.1-380.15, and FERC's practice is to engage in NEPA review of its licensing of hydropower projects – just as it did in the present case. *Final Environmental Impact Statement for Presumpscot River Projects*, R. 174.

III. The Plain Meaning of the Statute is Fully Confirmed by the History and Evolution of the Clean Water Act.

Through broad descriptions of § 401's scope and reference to FERC-licensed hydroelectric plants – activities that create pollution but do not add "pollutants" – the history of § 401 shows that "any discharge" is broader than "discharge of pollutants," and includes flows of water through dams. *See Russello*, 464 U.S. at 23 (the evolution and history of the statute supplies further support for its plain meaning).

A. The 1970 Act. The provision creating certification rights in states for activities which "may result in any discharge" was first enacted as § 21(b) of the Water Quality Improvement Act of 1970, Pub. L. 91-224, § 103, 84 Stat. 91, 108. There was no definition of "discharge" for § 21(b), leaving us to its common, broad meaning.

Congress expressed its intent to have the states issue certifications for a "wide variety of licenses and permits (construction, operating and otherwise) ... issued by various Federal agencies" that involve "activities or operations potentially affecting water quality." H.R. Rep. No. 127 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2691, 2697. The purpose of the provision that was to become § 21(b) was to:

> [P]rovide reasonable assurance ... that *no license or permit will be issued by a Federal agency* for an activity that through inadequate planning or otherwise could in fact become a source of pollution.

Ibid. (emphasis added).[28]

The House Report explained that "a Federal license or permit of some kind is required for almost all electric generating plants, and any Federal agency granting the relevant license can and should condition the grant upon compliance with applicable water quality standards." H.R. Rep. No. 127 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2691, 2698. Senator Cooper, a member of the Public Works Committee, explained:

> Indirectly, the Federal Government contributes to water pollution in its licensing activities over such things as . . . *hydroelectric power plants licensed by the Federal Power Commission*. . . . S. 7 will require, without exception, that all Federal activities that have any effect on water quality be conducted so that water quality standards will be maintained . . . section 16 [which later became section 21(b)] makes no exception for any licensed or permitted activity from its operative principle of State certification.

115 Cong. Rec. 28,971 (Oct. 7, 1969) (emphasis added).

B. The 1972 Amendments. In 1972, Congress reenacted § 21(b) as § 401(a). Pub. L. 92-500, 86 Stat. 816, 877. The major conceptual change in 1972 was the addition of the NPDES program under § 402. There is no evidence in the legislative history that Congress intended to limit the broad certification authority granted the states

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[28] *See also* 116 Cong. Rec. 9,325 (Mar. 25, 1970) (Statement of Rep. Blatnick (House Manager)) (the provision covers "those who seek a license or permit from a Federal agency for the use of our Nation's waters whether it be to build nuclear power plants, steam powerplants *or any other uses*") (emphasis added).

in § 21(b) to new permits addressing discharge of pollutants. The opposite is true – the scope of state certification was expanded to encompass compliance not only with water quality standards but also, *inter alia*, controls on the discharge of pollutants under the NPDES program.[27] "Section 401 is substantially § 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the Federal Water Pollution Control Act." H.R. Rep. No. 92-911, at 121 (1972), 1 *Legis. Hist.* 808.[28] As explained in the Senate Report:

> The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements. It should also be noted that the Committee continues the authority of the State or interstate agency to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State or jurisdiction of the interstate agency. Should such an affirmative denial occur no license or permit could be issued by such Federal agencies as the . . . *Federal Power Commission*, or the

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[27] This understanding was communicated to Congress by EPA. Statement of William Ruckelshaus, Administrator, EPA, Hearings on H.R. 11896, House Committee on Public Works, Dec. 7, 1971, 2 *Legis. Hist.* 1188 ("Water quality standards need to be strengthened and expanded to cover all waters . . . Effluent limitations are a means for achievement. They should not become an end in themselves. . . .").

[28] *See also*, Letter, William Ruckelshaus, Administrator, EPA, to Sen. Blatnik, Dec. 12, 1971, 1 *Legis. Hist.* 834, 852 ("Section 401 is essentially the same as the present section 21(b)"); Senate Debate on S-2770, Nov. 2, 1971, 2 *Legis. Hist.* 1394 ("Section 21(b), with minor changes, appears as section 401 of the pending bill S. 2770").

> Corps of Engineers unless the State action was overturned in the appropriate courts of jurisdiction.

S. Rep. No. 92-414, 2 *Legis. Hist.* 1487 (emphasis added).[29] Notably, Congress expressly continued the policy regarding the primacy of the states in the control of pollution within their boundaries. CWA § 101(b), 33 U.S.C. § 1251(b).

Petitioner misapprehends the drafting history of § 502(16) by suggesting that this provision was intended to contain an exclusive list of what constitutes a "discharge." Pet. Br. at 29-33. The BEP agrees that the House bill was the first to provide a separate definition for the term "discharge." H.R. 11896, § 502(13), (18), 1 *Legis. Hist.* 1069-71. The BEP also agrees that the bill was drafted so that certain thermal discharges were exempted from the definition of "pollutants," but were included in the term "discharge" in an apparent effort to ensure those discharges were subject to § 401 certification. Pet. Br. at 31; *see* H.R. 11896, § 502(6), 1 *Legis. Hist.* 1068. This does not, however, demonstrate that Congress enacted the separate definition of "discharge" in order to limit its prior broad meaning only to thermal discharges or pollutants. Such a sentiment is nowhere found in the legislative record.

Indeed, the fact remains that the drafters of the definition chose the non-exclusive term "includes" for

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[29] "[W]hat we are talking about is subjecting every activity in the private and public sector . . . to this kind of scrutiny." Senate Debate on S-2770, Nov. 2, 1971, 2 *Legis. Hist.* 1390 (Statement of Sen. Muskie).

"discharge" rather than the restrictive term "means" used for every other definition. The more obvious intent expressed by the language, history and purpose of the CWA is that Congress mandated that states be given an opportunity to apply their water quality standards to the broad range of federally licensed activities that could affect their water quality, including the new subjects of NPDES regulation. This is underscored by the dearth of any history suggesting that Congress intended the list in § 502(16) to be exclusive or complete. *See Chickasaw Nation*, 534 U.S. at 89.

In the final version, thermal discharges were removed from the definition of "discharge" because they were subsumed under "discharge of pollutants" which itself was "include[d]" in "discharge." Congress at the same time retained the separate term of "discharge," only confirming that "discharge" is not limited to "discharge of pollutants." If the only reason to include a separate term for "discharge" was to ensure thermal discharges were covered by § 401, Congress would have deleted § 502(16) in its entirety rather than retaining it. The drafters then could have replaced "discharge" in § 401 with the narrower term "discharge of pollutants," but clearly did not do so. The sloppy drafting that must be presumed for Petitioner's reading of the legislative history to be accepted simply finds no place in the record.

C. Congressional Acquiescence. A record of Congressional acquiescence to administrative interpretation, although not conclusive of legislative intent, can inform the Court's decision. *Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833, 846 (1986); *Bob Jones Univ.*

v. United States, 461 U.S. 574, 600 (1983). Since 1970, Congress has both amended[30] and declined to amend the CWA several times, cognizant of the agency interpretation and application of § 401, and has not altered the statute's structure as it has been applied to FERC-licensed hydropower facilities. For example, in 1995, there was an effort to amend the CWA in response to this Court's decision in *PUD No. 1*, by making FERC rather than states the final arbiter on water quality issues regarding dams. 141 Cong. Rec. H4,860-61 (May 11, 1995). From the debate on the bill, which did not survive committee, it is clear that those on all sides of the issue understood that "states currently have the right to condition hydroelectric power licenses issued by FERC to protect their bona fide interest in maintaining the water quality of their rivers and streams." *Id.* at H4,860 (Statement of Rep. Rahall). The Congressmen also understood this right covered relicensing of "hundreds" of hydropower projects. *Id.* at H4,860 (Statement of Rep. Bachus). The failure of this legislation shows that Congress is comfortable with the historical interpretation and implementation of § 401 by EPA, FERC and the states.

IV. Federal Agencies Have Interpreted and Applied "Any Discharge" as Including Flows through Hydropower Facilities.

Assuming *arguendo* any ambiguity, deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council,*

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[30] *See, e.g.*, Water Quality Act of 1987, Pub. L. 100-4, 101 Stat. 7; Federal Water Pollution Control Act Amendments of 1983, Pub. L. 97-440, 96 Stat. 2289; Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566.

Inc., 467 U.S. 837, 865-66 (1984), or at the very least persuasive respect, *Alaska Dep't of Envt'l Conservation v. Environmental Protection Agency*, 540 U.S. 461, 487-88 (2004), should be accorded the longstanding views of the federal government and its agencies that flows of water through dams constitute "any discharge" under § 401.

The EPA is the agency charged with implementing the CWA. The EPA has consistently taken the position in guidance documents that § 401 certification is required for FERC licenses of hydroelectric projects. Environmental Protection Agency, *Water Quality Standards Handbook* (1994), § 1.4, at p. 1-2 – 1-3 (Section 401 "applies to all Federal agencies that grant a license or permit. (For example, . . . licenses required for hydroelectric projects issued under the Federal Power Act.)"), and § 7.6.3, at pp. 7-10 – 7-11 (under § 401(a)(1), "EPA has identified five federal permits and/or licenses that authorize activities that may result in a discharge to the waters," including NPDES permits and "licenses required for hydroelectric projects issued under the Federal Power Act."); Environmental Protection Agency, *Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes*, at 20-23 (1989) (Section 401 certification required for hydroelectric projects licensed under the FPA).

Additionally, in briefs before this Court, the Solicitor General on behalf of EPA as well as other agencies, has explained that "when the operator of the dam releases water through a crest-gate, sluice-gate, release valve, or other similar device, it has caused a discharge within the meaning of Section 401." *Brief for the United States as Amicus Curiae Supporting Affirmance, PUD No. 1 of Jefferson County v. State of Washington, available in* 1993

U.S. S.Ct. Briefs LEXIS 573, at *23. As succinctly noted in that brief, "Congress employed the term 'discharge' when used without qualification (as in § 401(a)) more broadly than the term 'discharge of any pollutant,' which is used in a number of provisions" including under § 402. *Id.* at *23 n.4. Significantly, in the brief filed in *Miccosukee*, the United States explained that water control projects that "merely convey or connect navigable waters," and therefore do not need a § 402 NPDES permit, may nonetheless need a § 401 water quality certification. *Brief for the United States as Amicus Curiae Supporting Petitioner, South Florida Water Management District v. Miccosukee Tribe of Indians, available in* 2003 U.S. S.Ct. Briefs LEXIS 760, at **25, **46.[31] These consistent statements are reasonable and reflect the agency's "fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (legal briefs entitled to deference); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944).

The EPA memorandum, referred to by Petitioner in its brief at 22-23, creates no inconsistency. That memorandum on its face dealt exclusively with § 402, and indeed noted that § 401 and other provisions addressed problems beyond the scope of § 402. Memorandum from Ann R. Klee, EPA General Counsel, *et al.*, "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to

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[31] *See also, Brief for the Federal Respondent in Opposition to Petition for Writ of Certiorari, Oregon Natural Desert Association v. Dombeck*, No. 99-153, at 10, *available in* http://www.usdoj.gov/osg/briefs/1999/0responses/99-0153.resp.pdf ("water flows released through a dam . . . are 'discharges' within the meaning of the Clean Water Act" even though they "do not involve the 'addition' of pollutants. . . . [S]uch 'discharges' are subject to Section 401 certification.").

Water Transfers," at 8 (Aug. 5, 2005), *available in* http://www.epa.gov/ogc/documents/water_transfers.pdf.

FERC is not the agency that oversees the CWA directly but it does administer the FPA. Like EPA, FERC has interpreted and applied § 401 within the context of the FPA as requiring certifications for hydropower projects, without regard to whether there is any "addition" of a pollutant. 18 C.F.R. §§ 4.34(b)(5), 16.8; Federal Energy Regulatory Commission, *Handbook for Hydroelectric Project Licensing and 5 MW Exemptions from Licensing*, at B-2 & D-3 (2004). FERC has reiterated that position before this Court. *Brief for Federal Energy Regulatory Commission in Opposition to Petition for a Writ of Certiorari, North Carolina v. FERC, available in* 1998 W.L. 34112238, at *14 ("operation of the [hydropower] project results in a discharge – the flow of water back into the waterway after leaving the project impoundment or bypass facilities – that could not lawfully exist without the license. Therefore, such new licenses require certification from the State in which the water flows back into the river. . . . [T]he license applicant will require a Section 401(a)(1) certification from [the state] when [the] current license expires in 2001.").

To the same effect, FERC has consistently included DEP's § 401 conditions in its Maine hydropower licenses. *See* note 4, *supra*. Indeed, in relicensing another Maine hydropower project, FERC recently and explicitly rejected the same arguments made by the Petitioner here, finding that a "discharge" does not require the addition of some substance to the water being discharged. *FPL Energy Maine Hydro LLC*, 111 F.E.R.C. ¶ 61,104, at ¶¶ 17-25 (2005). *See also City of Augusta, Georgia*, 109 F.E.R.C. ¶ 61,210, ¶¶ 10-11 (2004) (rejecting argument that under

Miccosukee, § 401 certification cannot be required where water "is flowing continuously in the same river.").

CONCLUSION

For the reasons discussed above, the judgment of the Maine Supreme Judicial Court should be affirmed.

Respectfully submitted,

G. STEVEN ROWE
Attorney General

PAUL STERN
Deputy Attorney General

CAROL A. BLASI
Assistant Attorney General
(*Counsel of Record*)

GERALD D. REID
Assistant Attorney General

Six State House Station
Augusta, Maine 04333-0006
(207) 626-8582

Counsel for Respondent
Maine Board of
Environmental Protection

APPENDIX

Statutory Provisions Involved

33 U.S.C. § 1251 Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter –

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

* * *

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress

that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

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33 U.S.C. § 1313 Water quality standards and implementation plans

* * *

(c) Review; revised standards; publication

* * *

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

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33 U.S.C. § 1362 Definitions

* * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

* * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * *

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

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33 U.S.C. § 1371. Authority under other laws and regulations

(a) Impairment of authority or functions of officials and agencies; treaty provisions

This chapter shall not be construed as

> **(1)** limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter;

* * *

(c) Action of the Administrator deemed major Federal action; construction of the National Environmental Policy Act of 1969.

> **(1)** Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83

Stat. 852); and (2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to –

(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title; or

(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

(26)

No. 04-1527

FILED
FEB 1 0 2006
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SUPREME COURT, U.S.

In The
Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE BOARD OF
ENVIRONMENTAL PROTECTION,

Respondent.

**On Writ Of Certiorari To The
Maine Supreme Judicial Court**

REPLY BRIEF FOR PETITIONER

WILLIAM J. KAYATTA, JR.
MATTHEW D. MANAHAN
(*Counsel of Record*)
MARK E. PORADA
NICHOLAS D. LIVESAY
PIERCE ATWOOD LLP
One Monument Square
Portland, Maine 04101
(207) 791-1100
(207) 791-1350 Fax

Counsel for Petitioner
S.D. Warren Company

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

I. Respondents Fail To Give Proper Effect To Congress's Words Requiring That The Discharge Be "Into The Navigable Waters." 1

A. The Requirement That The Discharge Be Into The Navigable Waters Cannot Be Ignored As Some Type Of "Jurisdictional Necessity." 2

B. Congress Specified That The Discharge Must Be Into The Navigable Waters – Not Into The Riverbed Or Channel 3

C. The Presumpscot River Is A Single, Distinct Body Of Water 4

II. Respondents Fail To Support Their Claim That The Word "Discharge" Has Different Meanings In Sections 401 And 402 6

A. Use Of The Word "Includes" In Section 502(16) Offers No Basis For Inferring That The Word "Discharge" Itself Has Different Meanings In Sections 401 And 402 8

B. The Fact That Section 401 As Enacted In 1972 Was Derived From Section 21(b) Of The 1970 Act Provides No Basis For Presuming That The Word "Discharge" Has A Special And Unstated Meaning In Section 401 9

III. The Question Presented Is Not "Settled." 11

A. State Certification Was Initially Of Little Practical Importance 11

TABLE OF CONTENTS – Continued

Page

B. The Question Whether Certification Is Required Began To Percolate In The Mid 1990s 13

C. By The Late 1990s State Certification Began To Impact Dam Owners 14

D. *PUD No. 1* Did Not Resolve Or Even Address The Question Presented 15

E. The Question Presented Has Not Been Settled Formally At The Agency Level 15

IV. Respondents' Use Of Legislative History Is Both Unduly Selective And Ultimately Inadequate As A Basis For Rewriting Plain And Specific Statutory Language 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Addison v. Holly Hill Co., 322 U.S. 607 (1944) 19

Alabama Rivers Alliance v. FERC, 325 F.3d 290 (D.C. Cir. 2003) 7

American Rivers v. FERC, 129 F.3d 99 (2d Cir. 1997) 14

Carter v. United States, 530 U.S. 255 (2000) 17

Department of Revenue v. ACF Industries, Inc., 510 U.S. 332 (1994) 9

Director, Office of Workers Compensation Programs v. Rasmussen, 440 U.S. 29 (1979) 2

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 16

Exxon Mobil Corp. v. Allapattah Services, Inc., ___ U.S. ___, 125 S. Ct. 2611 (2005) 1, 8, 17, 19

Gustafson v. Alloyd Co., 513 U.S. 561 (1995) 8

National R.R. Passenger Corp. v. Boston and Maine Corp., 503 U.S. 407 (1992) 16

North Carolina v. FERC, 112 F.3d 1175 (D.C. Cir. 1997) 7

PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994) 13, 15

Rodriguez v. Compass Shipping Co., 451 U.S. 596 (1981) 18

Sorenson v. Secretary of Treasury, 475 U.S. 851 (1986) 9

TABLE OF AUTHORITIES – Continued

Page

South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) 5, 7

United States v. Menasche, 348 U.S. 528 (1955) 1

STATE CASES

S.D. Warren Co. v. Board of Environmental Protection, 2005 ME 27 ..... 1, 7

FEDERAL STATUTES

16 U.S.C. § 803(j) 12

33 U.S.C. § 1314(f)(2)(F) 3

33 U.S.C. § 1341 ..... *passim*

33 U.S.C. § 1342 ..... *passim*

33 U.S.C. § 1362(12) 9

33 U.S.C. § 1362(16) 7, 8

STATE STATUTES

ME. REV. STAT. ANN. tit. 38, § 341-A(2) 1

FEDERAL REGULATIONS

14 C.F.R. § 139.101 18

36 C.F.R. § 222.3 18

36 C.F.R. pt. 223 18

43 C.F.R. § 5400.0-5 18

43 C.F.R. § 5424.0-6 18

TABLE OF AUTHORITIES – Continued

Page

AGENCY ORDERS

Adirondack Hydro Development Corp., 63 F.E.R.C. ¶ 62,256 (1993) 12

Alaska Power & Telephone Co., 65 F.E.R.C. ¶ 62,122 (1993) 12

Beaver City Corp., 62 F.E.R.C. ¶ 62,207 (1993) 12

Blandin Paper Co., 62 F.E.R.C. ¶ 62,142 (1993) 12

Central Maine Power Co., 65 F.E.R.C. ¶ 62,154 (1993) 12

Central Vermont Public Service Corp., 69 F.E.R.C. ¶ 62,197 (1994) 14

City of Norwich, Department of Public Utilities, 62 F.E.R.C. ¶ 62,225 (1993) 12

Commonwealth Edison Co., 65 F.E.R.C. ¶ 62, 262 (1993) 12

CPS Products, Inc., 65 F.E.R.C. ¶ 62,211 (1993) 13

Evans, Jr., 63 F.E.R.C. ¶ 62,243 (1993) 13

Georgia Power Co., 62 F.E.R.C. ¶ 62,201 (1993) 12

Great Northern Paper, Inc., 77 F.E.R.C. ¶ 61,068 (1996) 14

Green Mountain Power Corp., 70 F.E.R.C. ¶ 62,205 (1995) 14

Heck, III, 65 F.E.R.C. ¶ 62,149 (1993) 12

Indiana Michigan Power Co., 65 F.E.R.C. ¶ 62,063 (1993) 12

Mayo Hydro, 62 F.E.R.C. ¶ 62,150 (1993) 12

TABLE OF AUTHORITIES – Continued

Page

Minnesota Power & Light Co., 65 F.E.R.C. ¶ 62,084 (1993) 12

Minnesota Power & Light Co., 65 F.E.R.C. ¶ 62,094 (1993) 12

Niagra Mohawk Power Corp., 63 F.E.R.C. ¶ 62,257 12

Pacific Gas & Electric Co., 62 F.E.R.C. ¶ 62,093 (1993) 12

Pacific Gas & Electric Co., 65 F.E.R.C. ¶ 62,265 (1993) 12

Potlatch Corp., 62 F.E.R.C. ¶ 62,143 (1993) 13

Potomac Edison Co., 63 F.E.R.C. ¶ 62,262 (1993) 12

Rumford Falls Power Co., 69 F.E.R.C. ¶ 61,063 (1994) 14

Sho-me Power Corp., 53 F.P.C. 1999, 1975 FPC LEXIS 792 (1975) 11

Town of Madison, Department of Electric Works, 81 F.E.R.C. ¶ 61,252 (1997) 14

Tunbridge Mill Corp., 68 F.E.R.C. ¶ 61,078 (1994) 13

Weyerhaeuser Co., 63 F.E.R.C. ¶ 61,191 (1993) 13

Weyerhaeuser Co., 63 F.E.R.C. ¶ 62, 194 (1993) 13

LEGISLATIVE HISTORY

116 Cong. Rec. 8984 (1970) 19

116 Cong. Rec. 9332 (1970) 19

H.R. Rep. No. 127 (1970) 18

S. 2770, 92 Cong. § 2 (1971) 10

TABLE OF AUTHORITIES – Continued

Page

Senate Consideration of the Report of the Conference Committee, October 4, 1972 10

Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) 10

Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970) 7, 10

OTHER

Letter from Jonathan Z. Cannon, EPA, et al., to Hon. Lois D. Cashell, FERC, regarding "Virginia Electric and Power Co." (Oct. 24, 1996) 16

REPLY BRIEF FOR PETITIONER

I. Respondents Fail To Give Proper Effect To Congress's Words Requiring That The Discharge Be "Into The Navigable Waters."

Warren agrees with Respondents that resolution of the question presented begins and ends with the language of the statute itself. Brief for Respondents American Rivers and Friends of the Presumpscot River ("A.R. Br.") at 19; Brief for Respondent Maine Board of Environmental Protection ("BEP Br.") at 15-19.[1] The language of section 401 plainly states that, in order for certification to be required, a licensed activity must pose a threat of a "discharge *into the navigable waters*." 33 U.S.C. § 1341 (emphasis supplied). Interpreting this language requires that we "give effect, if possible, to every clause and word." *United States v. Menasche*, 348 U.S. 528, 538 (1955); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, ___ U.S. ___, 125 S. Ct. 2611, 2620 (2005) (statutory interpretation requires examination of the text "in light of context, structure, and related statutory provisions"). However one might read the lone word "discharge" by itself, the complete

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[1] The Maine Department of Environmental Protection (the "DEP") consists of the Commissioner and the Board of Environmental Protection (the "BEP"). ME. REV. STAT. ANN. tit. 38, § 341-A(2). At issue in the present case is the water quality certification issued by the State of Maine through the Commissioner and affirmed by the BEP following Warren's intra-agency appeal. The agency-party in the Superior Court was the DEP. Pet. App. A-19. In publishing its decision the Supreme Judicial Court ("SJC") changed the name in the caption from DEP to BEP without explanation, and possibly inadvertently. *See* Pet. App. A-1. The Attorney General in his corrected brief to this Court now uses "BEP," while American Rivers uses "DEP," presumably because the DEP is indeed the actual agency itself. In this reply Warren follows the lead of the Attorney General and uses "BEP" to refer generally to the respondent state agency by whatever designation.

statutory phrase "discharge into the navigable waters" entails the introduction of something into the waters. Any reading that effectively writes the prepositional phrase "into the navigable waters" out of the statute is simply not a reasonable reading. "Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a line.'" *Dir., Office of Workers Comp. Programs v. Rasmussen*, 440 U.S. 29, 47 (1979).

Respondents nevertheless argue: (a) that Congress's words "into the navigable waters" can be more or less ignored as having no significance other than talismatically invoking Commerce Clause powers; (b) that the grammatical object of the preposition "into" can be something other than "the navigable waters;" and/or (c) that the river can be subdivided into upstream and downstream rivers, or diverted and undiverted rivers, the former of which then "discharges into" the latter. In each instance, Respondents' arguments grasp beyond the reach of Congress's words.

A. The Requirement That The Discharge Be Into The Navigable Waters Cannot Be Ignored As Some Type Of "Jurisdictional Necessity."

The BEP asserts that the "requirement that the discharge be 'into' navigable waters is a jurisdictional necessity to link the regulatory scheme to the Commerce Clause powers of Congress. The use of this simple preposition has no other significance . . . ." BEP Br. at 18. This assertion is simply wrong. Congress did not need to focus on discharges "into" the navigable waters in order to assert its powers under the Commerce Clause. Congress easily could have required certification for any activity that did anything "to the navigable waters" or "to the

quality of the navigable waters." The fact that Congress chose a particular and more specific formulation to justify the assertion of its powers under the Commerce Clause should provide more, not less, reason to abide by the particular words chosen.[2]

B. Congress Specified That The Discharge Must Be Into The Navigable Waters – Not Into The Riverbed Or Channel.

In their unsuccessful struggle with the statutory syntax, Respondents and their supporting *amici* frequently rewrite the grammatical object of the preposition "into," replacing "navigable waters" with "the river bed" or the "river channel." *See, e.g.*, U.S. Br. at 21 ("The facility thereby returns the water by 'discharge into' the same river channel from which it was withdrawn."); A.R. Br. at 27 & n.3 (equating "into rivers downstream" with "into the riverbed"). The BEP rewrites not only the statute, but even Warren's brief. *Compare* BEP Br. at 22 (citing Pet. Br. at 3 for the proposition that "according to Petitioner, the operation of a Facility 'channel[s]' the water 'back into' the River."), *with* Pet. Br. at 3 (water flowing through the dam is channeled "back into the river bed"). Similar linguistic alchemy appears at least nine other times in the briefs of the Respondents and the United States.[3] The fact that

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[2] CWA section 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F), demonstrates that Congress knew how to describe the mechanisms other than discharges by which dams do something to the navigable waters.

[3] *See, e.g.*, BEP Br. at 18-19 ("back *into* the riverbed" satisfies "[s]ection 401's requirement that the discharge be 'into' navigable waters"); U.S. Br. at 10 (describing Warren's dams as returning "the water into a different portion of the river channel"); *id.* ("into the concededly navigable river channel."); *id.* at 11 ("any 'flowing or issuing out' of water from the facility into the river channel"); *id.* at 14 ("return

(Continued on following page)

Respondents are so inexorably pulled away from Congress's words evidences the extent to which Respondents essentially seek to rewrite those words.

C. The Presumpscot River Is A Single, Distinct Body Of Water.

Alternatively, both Respondents adopt a version of the SJC's approach by dividing the Presumpscot River into several water bodies so that waters from one can be said to flow "into" the other's waters. In so doing, neither Respondent goes so far as to label the divided waters as "U.S." and "non-U.S." waters, an approach abandoned by all parties to this case. BEP Br. at 23; A.R. Br. at 25 n.17; *see also* U.S. Br. at 15. Rather, they use synonyms to create several fictional bodies of water. Thus, the BEP asserts that "the Presumpscot is not simply discharging into itself; the water flows into each Facility – including the impoundment, power canal, turbines and tailrace – out of which the water is emitted, *i.e.*, is discharged, 'into' the River." BEP Br. at 22. In this manner, the BEP ends up with: (1) the "Presumpscot;" (2) the "water" that flows through and discharges; and (3) the "River" into which the "water" discharges. American Rivers similarly uses the term "water" and "Presumpscot River" in order to be able to say that each of the dams "results in 'discharges' because their releases of water into the Presumpscot River clearly amount to a flowing or issuing out . . . ." A.R. Br. at

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the diverted water to the river channel"); *id.* (citing a case that refers to "the discharge of water from the Reservoir into a spilling basin below"); *id.* at 15 ("into the channel of the Presumpscot River"); *id.* ("the water is returned to the river's channel").

14; *see also id.* at 21 n.13 (each of Warren's hydropower projects "conveys water into the Presumpscot River").

Respondents adopt yet another variant of this approach in trying to reconcile their positions with the "pot of soup" analogy employed by this Court in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 110 (2004). They compare the ladled soup going back into the pot with water going through the dam and then going back "'into' a waterway." A.R. Br. at 26; *see also* BEP Br. at 22-23 (advancing a similar argument). In this manner, they argue, the waters flowing out of the dams constitute an "object" that is discharging "back into" something, the nature of which is not entirely clear. A.R. Br. at 26; BEP Br. at 22.

This entire approach is twice flawed.

First, no party can directly dispute that the present case involves a single, distinct body of navigable waters – the waters of the Presumpscot River. U.S. Br. at 16 n.4 (subscribing to the U.S. Environmental Protection Agency's position that a "dam merely conveys water from one location to another within the same waterbody" (citation and internal quotations omitted)); A.R. Br. at 1 (referring to "[t]he water body at issue in this case, the Presumpscot River"); *see* BEP Br. at 23 (describing a water's status as "unnecessary" to its analysis). Certainly the Presumpscot – whether the water is above, below, or within one of Warren's hydro projects – is a single body of water as that concept is applied in *Miccosukee*. 541 U.S. at 109-11. Assigning that single body of navigable waters different labels at different points as it flows downstream for no purpose other than being able to say that one thing discharges into another is to argue by tautology. Respondents are not looking at language and asking what it means. Rather, they are beginning with a conclusion and

then struggling with words to make the conclusion fit the statutory language.

Second, the suggestion that water flows through the dam "into" other waters "downstream" makes no sense. *See, e.g.*, A.R. Br. at 27 (characterizing the flow of water through dams as "hydropower facilities emitting waters 'into' rivers downstream"). Water upstream does not flow or discharge into water downstream. Rather, upstream water becomes downstream water as it flows downstream. To the extent that the condition of the water changes as it flows downstream, such a change is not the result of a discharge. Indeed, if one walled off entirely that which Respondents call a "discharge into the navigable waters," there would be no waters at all downstream.

II. Respondents Fail To Support Their Claim That The Word "Discharge" Has Different Meanings In Sections 401 And 402.

Respondents do not dispute that the word "discharge" as used in section 402, 33 U.S.C. § 1342, contemplates an "addition" to the navigable waters from a point source. They do not dispute that the mere "emitting" or "flowing" of water-borne pollutants out of the tailrace is not a discharge of pollutants into the Presumpscot River under section 402. Respondents argue, instead, that the word "discharge" in section 402 means something narrower than it does in section 401. Thus, say Respondents, there can be a "discharge" without any addition at all under section 401 even though there must be an addition for there to be a "discharge" of a pollutant under section 402.

No court or agency decision so holds. To the contrary, to the extent any issue pertinent to this appeal has been settled, it is that a discharge into the water requires an

addition to the water. Thus, in *Miccosukee*, the issue before the Court was not whether there was a pollutant present. The issue was whether there was a "discharge," and the answer was that there could be no discharge without an addition. *Miccosukee*, 541 U.S. at 110. Precisely the same reasoning has been repeatedly applied in defining the identical word in section 401. In the words of the SJC, "[a]n 'addition' is the fundamental characteristic of any discharge." Pet. App. A-6; *see also North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997) (reasoning that "the word 'discharge' contemplates the addition . . . of a substance or substances"); *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 299 (D.C. Cir. 2003) (reaffirming that "[a]s discussed in [*North Carolina*], 'the word "discharge" contemplates the addition . . . of a substance or substances' into the navigable waters").[4]

Respondents proffer only two arguments to support their position that the word "discharge" has different meanings in sections 401 and 402. First, they contend that the definition of "discharge" in section 502(16), 33 U.S.C. § 1362(16), provides no basis for limiting the "general term" discharge, which they say need not entail any "addition." Second, they argue that because "discharge" initially appeared in section 21(b) of the Water Quality Improvement Act of 1970 ("1970 Act"), Pub. L. No. 91-224, § 21(b), 84 Stat. 91, 108 (1970), its meaning is uninformed by the 1972 legislation. Neither argument can withstand even minimal scrutiny.

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[4] While Warren agrees that the *Alabama Rivers* court applied the proper legal standard, Warren disagrees with that court's application of the standard.

A. Use Of The Word "Includes" In Section 502(16) Offers No Basis For Inferring That The Word "Discharge" Itself Has Different Meanings In Sections 401 And 402.

A reader could infer from the language of section 502(16) that the term "discharge" when used by itself could involve the discharge of something other than a pollutant. Such an inference would give full voice to the argument that "includes" is not necessarily a word of limitation. Respondents, however, go much further. They contend that the very word "discharge" itself has a broader meaning in section 401 than it does in section 402. Respondents argue that the term "discharge" is a "general term," not a uniform "term of art," and that the dictionary definitions of the word "discharge" are numerous and broad enough to allow it to be used without connoting the addition of anything to anything. *See*, *e.g.*, A.R. Br. at 19-20, 22, 24; BEP Br. at 16-18; *see also* U.S. Br. at 10, 12-15, 18-20.

This argument asks too much and establishes too little.

It asks too much to presume that the word "includes," the use of which is otherwise fully understandable, should carry the extraordinary inference that Congress, without so stating, meant the same word to say different things. Such an inference violates a basic principle of statutory construction. *See Exxon Mobil Corp.*, 125 S. Ct. at 2622 (noting that it "is implausible, however, to say that the identical phrase means one thing" in one section of a statute "and something else" in a neighboring provision); *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) ("[W]e adopt the premise that the term should be construed, if possible, to give it a consistent meaning through

the Act. That principle follows from our duty to construe statutes, not isolated provisions."); *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) ("'[I]dentical words used in different parts of the same act are intended to have the same meaning.'") (quoting *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) (some internal quotation marks omitted)).

Respondents' argument that the word "discharge" by itself requires no addition establishes too little because the notion of putting something into the water is independently signified by the context in which "discharge" is used in section 401 (followed by the preposition "into"). In short, the context in which "discharge" is used in section 401 directly suggests the addition of something to the water; Congress in fact directly equated "discharge" with "addition" when defining the term "discharge of a pollutant," *see* 33 U.S.C. § 1362(12); and the general presumption (of which we can assume Congress was aware) is that the same word means the same thing. In this context, section 401 may not require the addition of a pollutant, but it does require the addition of something to the water.

B. The Fact That Section 401 As Enacted In 1972 Was Derived From Section 21(b) Of The 1970 Act Provides No Basis For Presuming That The Word "Discharge" Has A Special And Unstated Meaning In Section 401.

Central to Respondents' position is the observation that section 401 had its source in the 1970 Act, that the 1970 Act contained no definition of the word "discharge," and that it was therefore a "general term" rather than a "term of art." *See, e.g.*, U.S. Br. at 18-20; A.R. Br. at 40-41;

BEP Br. at 22. By this argument, section 402 was one of the "new provisions" (U.S. Br. at 19) and thus the fact that its "discharge" meant "addition . . . from a point source" is of no moment in assigning meaning to the "general term" "discharge" as written initially in 1970. *See id.*

On one level, this whole notion of differing "discharges" is irrelevant given that the Court is not called upon to construe the bare word out of context. Putting that point to one side, Respondents' argument still fails. The legislative record shows that Congress considered sections 401 and 402 and their associated definitions as part of a single whole. S. 2770, 92 Cong. § 2, at 146-52, 166 (1971) (proposing sections 401, 402, and 502(n)). In addition, in adopting section 401 Congress actually rewrote part of the language from section 21(b) of the 1970 Act, substituting the word "discharge" for the second use of the word "activity" as it had appeared in section 21(b). *Compare* 1970 Act, § 21(b), 84 Stat. at 108, *with* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 401, 86 Stat. 816, 877 (1972). If accepted, Respondents' argument would mean that the first word "discharge" in section 401, carried forward from the 1970 legislation, has the "general meaning," while the second word "discharge" in section 401 is a "new provision," presumably with a new meaning. Congress certainly said nothing to indicate that it was using the same word in its 1972 enactment to convey two different meanings. To the contrary, the Senate Report acknowledged that the term "discharge" was a "word of art" as used in the statute: "The term 'discharge' is a word of art in the legislation." *Senate Consideration of the Report of the Conference Committee, October 4, 1972, reprinted in* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 178 (1973). Nothing in this language or in the statute suggests

that this "word of art" has a different meaning in section 401 than it has in section 402 of that same legislation.

In sum, the bare word "discharge" has a single uniform meaning in the CWA except to the extent the statute's language or context says otherwise. No one disputes that the word means the addition of something from a point source as used in section 402. It should therefore mean the same thing in section 401, the difference being that section 401 requires only the threat of an addition, and does not state that the thing added actually need be a pollutant.

III. The Question Presented Is Not "Settled."

Respondents in various ways suggest that the question presented in this case largely has been settled in practice and in the courts for thirty-plus years. This is not correct. The question has been quiescent, not settled, because until recently it was of little practical significance.

A. State Certification Was Initially Of Little Practical Importance.

Until the early 1990s, the state certification associated with the relicensing of hydropower facilities such as Warren's was a mere formality. American Rivers cites 39 licenses issued by FERC from 1970 through 1975 (A.R. Br. at 44 n.27, 45 n.28); only one of those licenses contained state-imposed conditions, and those conditions, only two in number, did not influence operation of the project. *See Sho-me Power Corp.*, 53 F.P.C. 1999, 1975 FPC LEXIS 792, at *6-7 (1975). Further, states often waived the opportunity to certify dams, as Maine did with regard to the very dams involved in this case. Pet. Br. at 5.

By 1993, states were choosing to attach conditions to their 401 certifications for a greater percentage of hydro projects, but even then dam operators generally had little incentive to challenge whether states had the legal authority to certify the continued operation of all dams. Of the twenty-two FERC orders issuing hydropower licenses in 1993, for example, none contained burdensome state-imposed conditions, if they contained section 401 conditions at all.[5]

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[5] In seven of the twenty-two FERC Orders issuing hydropower licenses in 1993, the state waived section 401 certification. *Pac. Gas & Elec. Co.*, 62 F.E.R.C. ¶ 62,093, 63,136 (1993); *Mayo Hydro*, 62 F.E.R.C. ¶ 62,150, 63,266 (1993); *Adirondack Hydro Dev. Corp.*, 63 F.E.R.C. ¶ 62,256, 64,436 (1993); *Potomac Edison Co.*, 63 F.E.R.C. ¶ 62,262, 64, 512 (1993); *Heck, III*, 65 F.E.R.C. ¶ 62,149, 64,315 (1993); *Commonwealth Edison Co.*, 65 F.E.R.C. ¶ 62, 262, 64, 609 (1993); *Pac. Gas & Elec. Co.*, 65 F.E.R.C. ¶ 62,265, 64,634 (1993). In six of the orders FERC noted that certification was granted, but there is no indication that those certifications contained any conditions. *Blandin Paper Co.*, 62 F.E.R.C. ¶ 62,142, 63,221 (1993); *Georgia Power Co.*, 62 F.E.R.C. ¶ 62,201, 63,349 (1993); *Beaver City Corp.*, 62 F.E.R.C. ¶ 62,207, 63,378 (1993); *Minn. Power & Light Co.*, 65 F.E.R.C. ¶ 62,084, 64,152 (1993); *Minn. Power & Light Co.*, 65 F.E.R.C. ¶ 62,094, 64,192 (1993); *Alaska Power & Telephone Co.*, 65 F.E.R.C. ¶ 62,122, 64,250 (1993). In three of the orders FERC noted that those conditions that were called for by the states were consistent with FERC's own determination, indicating that the conditions would have been imposed under FERC's own authority regardless of whether the conditions had been part of the state certification. *City of Norwich, Dep't of Public Utils.*, 62 F.E.R.C. ¶ 62,225, 63,440 (1993); *Cent. Me. Power Co.*, 65 F.E.R.C. ¶ 62,154, 64,337 (1993); *Niagra Mohawk Power Corp.*, 63 F.E.R.C. ¶ 62,257, 64,456 (1993). Another order contained water quality-related conditions that were the product of negotiations between the state and FERC, and agreed upon at "the 10(j) meeting." *Ind. Mich. Power Co.*, 65 F.E.R.C. ¶ 62,063, 64,085 (1993). These conditions were attached to the final license under FERC's authority under section 10(j), 16 U.S.C. § 803(j), and not as a result of the state's authority under the CWA. In two orders, both concerning the construction of new dams, state certification was discussed only in the attached Environmental Assessment ("EA") and it

(Continued on following page)

B. The Question Whether Certification Is Required Began To Percolate In The Mid 1990s.

This Court's 1994 decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), emboldened states to emerge as a major factor in the FERC licensing process. *PUD No. 1* established that states may impose any limitations they see fit, as a condition of certification, provided the limitations are consistent with state water quality standards or "any other appropriate requirement of State law." 511 U.S. at 714 (internal quotations and citation omitted). As a result, rather than discussing with FERC the need for greater public access, improved fish passage, or the maintenance of minimum water levels in the bypass reach and allowing FERC to address these issues in light of the overall public benefit of the project, the door was opened for state environmental agencies to dictate license terms as a condition of state certification.

FERC initially pushed back: "After careful consideration, we have decided that our prior conclusion regarding the mandatory nature of conditions contained in state water quality certifications was incorrect." *Tunbridge Mill Corp.*, 68 F.E.R.C. ¶ 61,078, 61,387 (1994). FERC

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is unclear whether FERC included the conditions of certification in the final licenses. *Evans, Jr.*, 63 F.E.R.C. ¶ 62,243, 64,401 (1993); *CPS Prods., Inc.*, 65 F.E.R.C. ¶ 62,211, 64,478 (1993). Another order referenced state certification only in the attached EA and noted that the lone condition – that the applicant submit an "Operational Plan" – had been satisfied by the time FERC issued its license. *Potlatch Corp.*, 62 F.E.R.C. ¶ 62,143, 63,240 (1993). Finally, in two orders FERC noted that one condition – a water temperature monitoring requirement – was inconsistent with its determination, but that nevertheless it had to include the state condition. *Weyerhaeuser Co.*, 63 F.E.R.C. ¶ 61,191, 62,437 (1993); *Weyerhaeuser Co.*, 63 F.E.R.C. ¶ 62,194, 63,056 (1993).

thereafter demonstrated a willingness to reject or amend conditions similar to those contained in Warren's current licenses. *See, e.g., Cent. Vt. Pub. Serv. Corp.*, 69 F.E.R.C. ¶ 62,197, 64,435-36 (1994) (rejecting part of a condition related to upstream fish passage and a condition allowing the certification to be reopened and amended); *Green Mountain Power Corp.*, 70 F.E.R.C. ¶ 62,205, 64,436-37 (1995) (rejecting conditions allowing the state to later amend peak flow and draw down levels); *see also Great Northern Paper, Inc.*, 77 F.E.R.C. ¶ 61,068, 12 (1996) (rejecting Maine DEP conditions of section 401 certification).

In addition, license applicants recognized that many conditions attached by states to their section 401 certifications would effectively duplicate conditions that FERC would impose pursuant to its authority under the Federal Power Act. *See, e.g., Rumford Falls Power Co.*, 69 F.E.R.C. ¶ 61,063, 61,248 (1994) (noting that Maine DEP lacked authority to require recreational canoe access, but nevertheless requiring such access on its own). Thus, in many instances a successful challenge to a state certification would have been very expensive and time consuming with little practical effect.

C. By The Late 1990s State Certification Began To Impact Dam Owners.

In 1997, the Second Circuit held that FERC must incorporate all conditions of state certification in its final license – even those conditions FERC sees as being beyond a state's authority under section 401. *American Rivers v. FERC*, 129 F.3d 99, 110-11 (2d Cir. 1997). FERC immediately began incorporating all state certification conditions into its licenses. *See, e.g., Town of Madison, Dep't of Elec. Works*, 81 F.E.R.C. ¶ 61, 252, 62,157 (1997) ("[W]e are

required by the recent decision . . . in *American Rivers* . . . to accept all conditions in water certification as conditions on a license even if we believe that the conditions may be outside the scope of Section 401."). Less than two years later, when Warren first commenced the license renewal process for these dams in January of 1999, Warren raised the question presented in this case.

D. *PUD No. 1* Did Not Resolve Or Ever Address The Question Presented.

PUD No. 1 involved the construction of a new dam, as opposed to the relicensing of an existing facility. 511 U.S. at 708. Construction necessarily involved the discharge of fill material into the river. Based on this fact alone the need for state certification was apparent. Thus, the license applicant lacked incentive to contest whether the mere flow of water through a dam was an independent reason for requiring certification, and this Court never decided the issue.

E. The Question Presented Has Not Been Settled Formally At The Agency Level.

Respondents cite various agency materials containing statements about the scope of section 401 in support of their argument that all federally licensed dams must undergo state certification. A.R. Br. at 47; BEP Br. at 39. All but one of these documents is entirely consistent with Warren's position that only the licensing of new dams and some operating dams require certification. The only cited agency document that can be read as implying that all federally licensed dams require certification is an October 26, 1996 letter. Letter from Jonathan Z. Cannon, EPA, et al., to Hon. Lois D. Cashell, FERC, regarding "Virginia

Electric and Power Co." at 4 (Oct. 24, 1996) (cited in U.S. Br. at 22 n.9). Such a letter hardly settles the matter.

Even if this question had been formally "settled" by an agency regulation following notice and comment without dissent, such a regulation could not dictate a statutory interpretation that could not reasonably be borne by the text of the statute itself. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) ("Of course, a reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms."); *Nat'l R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 418 (1992) (stating that "a reviewing court need not accept an interpretation which is unreasonable").

IV. Respondents' Use Of Legislative History Is Both Unduly Selective And Ultimately Inadequate As A Basis For Rewriting Plain And Specific Statutory Language.

Respondents, *et al.*, argue at length that in enacting the CWA, Congress was motivated by, among other things, the goals of improving water quality, preserving state control over water quality, and the reduction of water pollution. Warren does not dispute that each of these goals provided much of the motivation for portions of the CWA. Nor does Warren dispute that section 401 is aimed at reducing the scope of federal preemption that might otherwise apply to state regulation of federally licensed projects.

The question, instead, concerns the precise extent to which Congress ultimately chose to pursue those goals. The answer to that question is found, in the first instance, by examining the statutory language. Only when that language is ambiguous does one begin a search through

legislative history. *See, e.g., Exxon Mobil Corp.*, 125 S. Ct. at 2625 ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material."); *Carter v. United States*, 530 U.S. 255, 270 (2000) ("reliance on ... legislative history is unavailing in light of this Court's approach to statutory interpretation, which begins by examining the text, not by psychoanalyzing those who enacted it") (internal quotation and citations omitted). Were the law otherwise, Congress need simply pass one sentence laws announcing its goals, leaving it to agencies and courts to rule in whatever way furthered such goals.

Respondents rely heavily on snippets of legislative history summarizing statutory aims in characteristically broad terms. They repeatedly quote legislative history leading up to the 1970 Act referring to "activities or operations potentially affecting water quality." BEP Br. at 33; *see also id.* at 34. The BEP thus baldly asserts that "Congress expressed its intent to have the states issue certifications for a 'wide variety of licenses and permits (construction, operating and otherwise) ... issued by various federal agencies' that involve 'activities or operations potentially affecting water quality.'" BEP Br. at 33 (selectively quoting excerpts from H.R. Rep. No. 127 (1970)). Similarly, the BEP quotes Senator Cooper to the effect that "all Federal activities that have any effect on water quality be conducted so that water quality standards will be maintained ...." *Id.* at 34. Of course the statute itself, and even section 21(b) of the 1970 Act, does not say that certification must be obtained for any licensed activity that has any effect on water quality.

In fact, it is beyond dispute that section 401 does not apply, as Respondents claim, to all federal licenses that

involve activities or operations potentially affecting water quality. Licensed or permitted activities – *e.g.*, the operation of an airport (14 C.F.R. § 139.101), or the harvesting of timber (36 C.F.R. pt. 223, 43 C.F.R. §§ 5400.0-5, 5424.0-6) or the grazing of cattle (36 C.F.R. § 222.3) on federal lands – that potentially result in serious impacts on water quality from non-point source run-off, even Respondents would appear to agree, are not within the ambit of sections 401 or 402. That the statute does not reach all activities affecting water quality is further highlighted by the fact that, as expressly recognized by the United States, "diverting water away from" a river, even by means of what the United States calls a "discharge," does not require a certification under section 401. U.S. Brief at 21 n.8. If one of Warren's dams diverted the entire Presumpscot River away from the riverbed to a bottling plant, the impact on water quality in the impoundment and below the dam, as defined by Respondents, would be no less than that said to result from the current dams.

In sum, it is clear even to Respondents that Congress did not choose to require state certifications for all federally licensed activities that might adversely affect water quality. Instead, Congress required such certifications for only certain activities, which section 401 defines. The issue, accordingly, is not whether the CWA grants states complete insulation from the preemptive effect of any federally regulated activity that might affect water quality. It did not. The issue, instead, is where Congress drew the line.

To resolve this issue, "[a]s with other problems of interpreting the intent of Congress in fashioning various details of this legislative compromise, the wisest course is to adhere closely to what Congress has written." *Rodriguez*

v. Compass Shipping Co., 451 U.S. 596, 617 (1981); *see also Addison v. Holly Hill Co.*, 322 U.S. 607, 618 (1944) ("But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive.").

Nor is the legislative record itself quite what Respondents portray it to be. In picking out their friends in the crowd, *see Exxon Mobil Corp.*, 125 S. Ct. at 2625, to suggest that Congress intended to require certification for all dam licenses, Respondents overlook the precise language used by Senator Muskie in describing exactly what dams were anticipated to be included: "[A]ny new industry . . . that requires . . . a license from the Federal Power Commission to build a dam . . . will be required to obtain this certification of compliance with water quality standards." 116 Cong. Rec. 8984 (1970); *see also* 116 Cong. Rec. 9332 (1970) (proper certification required "for any new dam which requires a license from the Federal Power Commission") (Statement of Congressman Fallon, Floor Manager of the 1970 Act).

Construction of a new dam very likely involves discharges of material into the water. The operation of an existing dam generally does not. Legislators' suggestions that it is the former that is within section 401 are completely consistent with the language of the statute. Respondents' contention that the latter are necessarily covered as well is not.

CONCLUSION

A Congress focused on activities that put something into the navigable waters could have written section 401 easily and naturally as it stands. Conversely, if Congress had intended to capture activities that did not involve putting anything at all into the water, then there is no

reason to think that it would have contemplated using a phrase like "discharge into the navigable waters." To now "interpret" the language of section 401 to say what could have been more easily and naturally said in other words is to rewrite what Congress has written.

Respectfully submitted,

WILLIAM J. KAYATTA, JR.
MATTHEW D. MANAHAN
(*Counsel of Record*)
MARK E. PORADA
NICHOLAS D. LIVESAY
PIERCE ATWOOD LLP
One Monument Square
Portland, ME 04101
phone (207) 791-1100
(207) 791-1350 Fax

Counsel for Petitioner
S.D. Warren Company

(16)

Supreme Court, U.S.
FILED
[illegible] - 2005

No. 04-1527

In the Supreme Court of the United States

S.D. WARREN COMPANY, PETITIONER

v.

MAINE BOARD OF ENVIRONMENTAL PROTECTION

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

PAUL D. CLEMENT
Solicitor General
Counsel of Record

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

GREER S. GOLDMAN
ELLEN J. DURKEE
JOHN L. SMELTZER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

ANN R. KLEE
General Counsel
Environmental Protection Agency
Washington, D.C. 20460

QUESTION PRESENTED

Section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1), provides that an applicant for a federal license to conduct any activity "which may result in any discharge into the navigable waters" must obtain a certification from the State in which the discharge originates stating that the discharge will comply with applicable provisions of the Act and other appropriate requirements of state law. The question presented is whether petitioner's operation of its hydroelectric facilities, which are subject to Federal Energy Regulatory Commission licensing requirements under Section 4(e) of the Federal Power Act, see 16 U.S.C. 797(e), may result in a "discharge into the navigable waters" within the meaning of Section 401(a) of the Clean Water Act.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
A. FERC licensing requirements 2
B. The Clean Water Act 4
C. The proceedings in this case 7
Summary of argument 10
Argument:
Petitioner's operation of its hydroelectric facilities results in a "discharge into the navigable waters" for purposes of Section 401(a) of the Clean Water Act 11
A. The term "discharge" in Section 401(a) should be interpreted in light of its ordinary meaning 12
B. The ordinary meaning of discharge—"a flowing or issuing out"—encompasses a hydroelectric facility's release of diverted water to a river channel 13
C. The term "discharge" does not require an "addition" 15
D. This Court's decisions support interpreting the term "discharge" according to its ordinary meaning 23
E. The Clean Water Act's purpose and legislative history support the conclusion that petitioner's facilities result in a "discharge into the navigable waters" 25
Conclusion 30

TABLE OF AUTHORITIES

Cases:

Alabama Rivers Alliance v. *FERC*, 325 F.3d 290 (D.C. Cir. 2003) 26

Cases—Continued: Page

American Rivers, Inc. v. *FERC*, 129 F.3d 99 (2d Cir. 1997) 26
Arizona v. *California*, 373 U.S. 546 (1963) 14
Barnhart v. *Walton*, 535 U.S. 212 (2002) 22
Bates v. *United States*, 522 U.S. 23 (1997) 21
California v. *FERC*, 495 U.S. 490 (1990) 26
Catskill Mountains Chapter of Trout Unlimited, Inc. v. *New York*, 273 F.3d 481 (2d Cir. 2001) 24
Chickasaw Nation v. *United States*, 534 U.S. 84 (2001) 13, 21
EPA v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976) 3, 4, 5, 19
Escondido Mut. Water Co. v. *La Jolla Band of Mission Indians*, 466 U.S. 765 (1984) 3
FDIC v. *Meyer*, 510 U.S. 47 (1994) 13, 18
First Iowa Hydro-Elec. Coop. v. *FPC*, 328 U.S. 152 (1946) 26
Helvering v. *Morgan's Inc.*, 293 U.S. 121 (1934) 13
National Wildlife Fed'n v. *Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) 16, 17
National Wildlife Fed'n v. *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) 17, 24, 26
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Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 (1941) 21
PUD No. 1 v. *Washington Dep't of Ecology*, 511 U.S. 700 (1994) 6, 11, 14, 21, 23

Cases—Continued: Page

S.D. Warren Co.:
105 F.E.R.C. ¶ 61,009-61,013 (Oct. 2, 2003) 9
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S.D. Warren Co. v. *Federal Energy Regulatory Comm'n*, No. 04-1105 (D.C. Cir. May 6, 2005) 9
Solid Waste Agency v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) 4
South Fla. Water Mgmt. Dist. v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) 11, 23, 24
United States v. *Arizona*, 295 U.S. 174 (1935) 14
United States v. *James*, 478 U.S. 597 (1986) 14
Wyoming v. *Colorado*, 259 U.S. 419 (1922), modified, 260 U.S. 1 (1922), vacated, 353 U.S. 953 (1959) 14

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Clean Water Act, 33 U.S.C. 1251 *et seq.* ..... *passim*
§ 101(a), 33 U.S.C. 1251(a) 4, 1a
§ 101(a)(1), 33 U.S.C. 1251(a)(1) 4, 25
§ 101(b), 33 U.S.C. 1251(b) 4, 5, 11, 15, 24, 25, 27, 1a
§ 101(d), 33 U.S.C. 1251(d) 2
§ 106, 33 U.S.C. 1256 5
§ 301, 33 U.S.C. 1311 ..... 6, 19, 20
§ 301(a), 33 U.S.C. 1311(a) 4, 19
§ 301(a)(2), 33 U.S.C. 1311(a)(2) 19
§§ 301-302, 33 U.S.C. 1311-1312 4
§ 302, 33 U.S.C. 1312 6
§ 302(a)(9), 33 U.S.C. 1312(a)(9) 19

Statutes and regulations—Continued: Page

§ 303, 33 U.S.C. 1313 ..... 6, 27
§ 303(c)(2)(A), 33 U.S.C. 1313(c)(2)(A) 6
§ 304, 33 U.S.C. 1314 5
§ 304(f)(2)(C), 33 U.S.C. 1314(f)(2)(C) 27
§ 304(f)(2)(F), 33 U.S.C. 1314(f)(2)(F) 27
§ 306, 33 U.S.C. 1316 6
§§ 306-307, 33 U.S.C. 1316-1317 4
§ 307, 33 U.S.C. 1317 6
§ 401, 33 U.S.C. 1341 ..... *passim*
§ 401(a), 33 U.S.C. 1341(a) ..... *passim*
§ 401(a)(1), 33 U.S.C. 1341(a)(1) 2, 4, 10, 3a
§ 401(b), 33 U.S.C. 1341(b) 2
§ 401(d), 33 U.S.C. 1341(d) 6, 9, 14, 3a
§ 402, 33 U.S.C. 1342 ..... 4, 5, 19, 20, 24, 25
§ 402(a), 33 U.S.C. 1342(a) 19, 24
§ 402(b), 33 U.S.C. 1342(b) 5
§ 404, 33 U.S.C. 1344 ..... 4, 5
§ 404(a), 33 U.S.C. 1344(a) 1
§ 404(g)-(h), 33 U.S.C. 1344(g)-(h) 5
§ 502, 33 U.S.C. 1362 12
§ 502(6), 33 U.S.C. 1362(6) 5, 12, 4a
§ 502(7), 33 U.S.C. 1362(7) 12, 16, 21
§ 502(12), 33 U.S.C. 1362(12) .. 7, 10, 12, 13, 18, 20, 24, 4a
§ 502(14), 33 U.S.C. 1362(14) 12
§ 502(16), 33 U.S.C. 1362(16) 6, 8, 10, 11, 12, 19, 20, 4a
§ 502(19), 33 U.S.C. 1362(19) 5, 15, 24, 26, 4a

Statutes and regulations—Continued: Page

§ 510, 33 U.S.C. 1370 ..... 5, 11, 26, 5a
§ 511(c)(2), 33 U.S.C. 1371(c)(2) 27
Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 27
§ 64, 91 Stat. 1599 28
Federal Power Act, ch. 285, 41 Stat. 1063 (16 U.S.C. 791 *et seq.*) 1, 2
§ 1, 16 U.S.C. 792 2
§ 4(e), 16 U.S.C. 797(e) 2, 3
§ 6, 16 U.S.C. 799 ..... 2, 9
§ 10(a)(1), 16 U.S.C. 803(a)(1) 3
§ 18, 16 U.S.C. 811 3
§ 23(b)(1), 16 U.S.C. 817(1) 2
Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 3
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§ 1, 33 U.S.C. 466 (1964) 4
§ 3, 33 U.S.C. 466a (Supp. V 1969) 18
§ 10(b), 33 U.S.C. 466g(b)(Supp. V 1969) 3
§ 10(c), 33 U.S.C. 466g(c) (Supp. V 1969) 3
§ 11, 33 U.S.C. 1161 (1970) 19
§ 11(a)(2), 33 U.S.C. 1161(a)(2) (1970) 19
§ 13, 33 U.S.C. 1163 (1970) 19
§ 13(a)(9), 33 U.S.C. 1163(a)(9) (1970) 19
§ 21(b), 33 U.S.C. 1171(b) (1970) 3, 4, 18, 28
National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* 27

Statutes and regulations—Continued: Page

Public Utility Act of 1935, ch. 687, § 210, 49 Stat. 846 2
Rivers and Harbors Appropriation Act of 1899, ch. 425, § 10, 30 Stat. 1151 (33 U.S.C. 403) 1
Water Quality Act of 1965, Pub. L. No. 89-234, § 5(a), 79 Stat. 907 6
Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 103, 84 Stat. 108 3
28 U.S.C. 1257(a) 9
18 C.F.R.:
Section 4.30(a)(2) 7
Section 4.34(b)(5)(I) 7
Section 5.1(d) 7
Section 5.18(b)(3)(I) 7
40 C.F.R.:
Pt. 122:
Section 122.2 16
Section 122.45(g)(4) 17
Pt. 123 5
Pt. 131 6
Pts. 401-471 4

Miscellaneous:

115 Cong. Rec. 28,971 (1969) 27
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Miscellaneous—Continued: Page

H.R. Rep. No. 127, 91st Cong., 1st Sess. (1969) 28
H.R. Rep. No. 940, 91st Cong., 2d Sess. (1970) 19
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(1971) 23
(1993) 10, 12, 14

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INTEREST OF THE UNITED STATES

This case presents the question whether Section 401(a) of the Clean Water Act (CWA), 33 U.S.C. 1341(a), requires petitioner to obtain, as a prerequisite to issuance of federal licenses for its five hydroelectric facilities, a state certification that the water leaving those facilities complies with applicable federal and state water pollution control requirements. The Federal Energy Regulatory Commission (FERC), which licenses hydroelectric facilities under the Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, and the Department of the Army, which administers permit programs respecting waters of the United States, see CWA § 404(a), 33 U.S.C. 1344(a); Rivers and Harbors Appropriation Act of 1899, ch. 425, § 10, 30 Stat. 1151 (33 U.S.C. 403), must implement and comply with the requirements of Section 401(a) in conducting their licensing and permitting programs. Section 401 also directs

the Environmental Protection Agency (EPA), which is generally responsible for administering the Clean Water Act, see 33 U.S.C. 1251(d), to provide the requisite water quality certifications when a State lacks authority to do so, 33 U.S.C. 1341(a)(1), and to provide compliance information upon request from any federal, state, or interstate department or agency, 33 U.S.C. 1341(b). The federal government therefore has a substantial regulatory interest in the resolution of the question presented.

STATEMENT

A. FERC Licensing Requirements

Congress enacted the Federal Power Act in 1920 to encourage, among other things, the development of water power. See ch. 285, 41 Stat. 1063. To promote the sound development of water resources, federal law has provided since 1935 that "[i]t shall be unlawful for any person * * * for the purpose of developing electric power * * * to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States" without a federal license granted pursuant to that Act. FPA § 23(b)(1), 16 U.S.C. 817(1); see Public Utility Act of 1935, ch. 687, § 210, 49 Stat. 846. Congress has authorized FERC, which has assumed the responsibilities of the Federal Power Commission (FPC), see FPA § 1, 16 U.S.C. 792, to grant such licenses for periods up to, but not exceeding, 50 years, FPA §§ 4(e), 6, 16 U.S.C. 797(e), 799.

When FERC reviews a license application for any new or existing project, the agency operates under a broad statutory mandate to ensure that the project is "adapted to a comprehensive plan for improving or developing a waterway" for multiple purposes, including: (a) "interstate or foreign commerce"; (b) "improvement and utilization of water power development"; (c) "adequate protection, mitigation, and en-

hancement of fish and wildlife"; and (d) "other beneficial public uses." See FPA § 10(a)(1), 16 U.S.C. 803(a)(1). FERC's authority is tempered, however, by other statutory provisions that mandate inclusion of terms prescribed by other agencies. See FPA § 4(e), 16 U.S.C. 797(e); FPA § 18, 16 U.S.C. 811; *Escondido Mut. Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984).

Beginning in 1970, Congress subjected federal licensing proceedings, including Federal Power Act license proceedings, to a new requirement originating in the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 103, 84 Stat. 107, which amended the Federal Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155. The 1948 Act, which had been amended numerous times between 1948 and 1970, gave the federal government only a limited role in water pollution control and encouraged States to develop and enforce "water quality standards." See 33 U.S.C. 466g(b) and (c) (Supp. V 1969); *EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202-203 (1976). The Water Quality Improvement Act of 1970 added a new Section 21(b) to the Federal Water Pollution Control Act. See § 103, 84 Stat. 108. Section 21(b) mandated that any applicant for a federal license to conduct an activity "which may result in a discharge into the navigable waters of the United States" must provide the licensing authority with a certification from the State in which the discharge would originate certifying that the activity would be conducted in a manner that would not violate the State's water quality standards. 33 U.S.C. 1171(b) (1970). Soon thereafter, Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, which enlarged the federal government's role in water pollution control generally and established a framework for federal-state cooperation that is a central feature of the current Clean Water Act. See *California*, 426 U.S. at 202-208. The 1972 Amendments incorporated the relevant terms of the Water Quality Improvement Act of 1970, originally codified at

33 U.S.C. 1171(b) (1970), into Section 401(a)(1) of the current Clean Water Act, 33 U.S.C. 1341(a)(1).

B. The Clean Water Act

The Clean Water Act seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," CWA § 101(a), 33 U.S.C. 1251(a), through a comprehensive and multifaceted strategy that assigns distinct roles to the federal government and the States. That Act declares a "national goal" of eliminating "the discharge of pollutants into the navigable waters," CWA § 101(a)(1), 33 U.S.C. 1251(a)(1), and it specifically prohibits the "discharge of any pollutant by any person" except in compliance with prescribed statutory requirements, CWA § 301(a), 33 U.S.C. 1311(a). Those requirements include federal effluent limitations, CWA §§ 301-302, 33 U.S.C. 1311-1312, and federal standards of performance, CWA §§ 306-307, 33 U.S.C. 1316-1317, which place restrictions on the discharge of pollutants. See generally 40 C.F.R. Pts. 401-471. Those requirements also include two federal permit programs applicable to the discharge of pollutants: (1) the "National Pollutant Discharge Elimination System" (NPDES) program, CWA § 402, 33 U.S.C. 1342; and (2) a separate permit program for the discharge of "dredged or fill material," CWA § 404, 33 U.S.C. 1344.

While Congress has established specific federal controls on the "discharge of pollutants," it also has continued the policy, reflected in the Federal Water Pollution Control Act of 1948, to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and to "plan the development and use * * * of * * * water resources." CWA § 101(b), 33 U.S.C. 1251(b); see 33 U.S.C. 466 (1964); see, *e.g.*, *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 166-167 (2001). Congress made explicit its understanding that the States retain authority to regulate water "pollution" that extends beyond the Clean Water Act's more

precisely targeted federal restrictions on the "discharge of pollutants." Compare CWA § 502(6), 33 U.S.C. 1362(6) (defining "pollutant" to mean specific substances), with CWA § 502(19), 33 U.S.C. 1362(19) (defining "pollution" more broadly to encompass any "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water").

Congress also recognized the need to coordinate federal and state efforts based on principles of cooperative federalism. See CWA § 101(b), 33 U.S.C. 1251(b). The Clean Water Act provides for federal funding of state initiatives, federal-state consultation on a variety of issues, and state enforcement of federal standards. See, *e.g.*, CWA §§ 106, 304, 510, 33 U.S.C. 1256, 1314, 1370. The Act expressly allows States to impose "standard[s] or limitation[s] respecting discharges of pollutants" or "abatement of pollution" that are more stringent than, or in addition to, those federal standards set out under the Act. See CWA § 510, 33 U.S.C. 1370. It also allows EPA to authorize States to administer portions of the federal permitting programs set out in Sections 402 and 404. See CWA §§ 101(b), 402(b), 404(g)-(h), 33 U.S.C. 1251(b), 1342(b), 1344(g)-(h); 40 C.F.R. Pt. 123; see generally *California*, 426 U.S. at 206-209.

As one important element of this strategy for federal-state cooperation, Congress retained, through Section 401 of the Clean Water Act, the state water quality certification program that Congress had initiated in the Water Quality Improvement Act of 1970. Section 401(a) provides, in pertinent part, that "[a]ny applicant for a Federal license or permit to conduct any activity * * * which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate * * * that any such

discharge will comply with the applicable provisions" of designated sections of the Act. 33 U.S.C. 1341(a).[1]

Section 401 ensures that, before federal licensing and permitting agencies authorize activities that "may result in any discharge" into the waters of the United States, the State in which the discharge originates will have the opportunity to determine whether the discharge would comply with applicable provisions of the Act, including Section 303 state water quality standards and other appropriate requirements of State law. See *PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700, 704-708 (1994). The potential for "any discharge" into navigable waters triggers the requirements of Section 401, thereby allowing the State to impose appropriate conditions to ensure that the activity, and not just the discharge, complies with state water quality standards. See *id.* at 711-712. Under Section 401(d), any such state-specified, water-quality-related conditions "shall become" part of the federal license. 33 U.S.C. 1341(d). See *PUD No. 1*, 511 U.S. at 708, 711-713.

The Clean Water Act does not contain a delimited definition of the critical triggering term "discharge," but makes clear that "[t]he term 'discharge' when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants," CWA § 502(16), 33 U.S.C. 1362(16) (emphasis

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[1] The designated provisions include Sections 301 and 302, which establish federal effluent limitations, see 33 U.S.C. 1311, 1312, and Sections 306 and 307, which establish federal standards of performance, see 33 U.S.C. 1316, 1317. The designated provisions also include Section 303, which requires States to establish water quality standards. 33 U.S.C. 1313. Congress first introduced the concept of water quality standards through the 1965 amendments to the Federal Water Pollution Control Act of 1948. See Water Quality Act of 1965, Pub. L. No. 89-234, § 5(a), 79 Stat. 907. Under the current provisions of the Clean Water Act, water quality standards "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses," CWA § 303(c)(2)(A), 33 U.S.C. 1313(c)(2)(A), and also require an "antidegradation policy," *PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700, 704-705 (1994); see generally 40 C.F.R. Pt. 131.

added). The Act does contain a definition of those included activities: "[t]he term 'discharge of a pollutant' and the term 'discharge of pollutants' each means * * * any addition of any pollutant to navigable waters from any point source," CWA § 502(12), 33 U.S.C. 1362(12).

C. The Proceedings In This Case

Petitioner owns and operates six hydroelectric facilities on the Presumpscot River in southern Maine. The facilities provide power for petitioner's paper mill in Westbrook, Maine. Pet. App. A2. Anticipating the expiration of existing federal licenses for five of the projects, petitioner submitted coordinated applications to FERC in 1999 for a new license for each project. See *S.D. Warren Co.*, 105 F.E.R.C. ¶ 61,011, at 61,084 (Oct. 2, 2003). FERC regulations required petitioner, as an applicant for a new license, to consult with Maine's DEP, the state agency responsible for Section 401 certifications, see 18 C.F.R. 4.30(a)(2), 5.1(d), and to file with the State "a request for a water quality certification * * * as required by Section 401 of the Clean Water Act," 18 C.F.R. 4.34(b)(5)(i), 5.18(b)(3)(i).

As petitioner explains, its hydroelectric facilities generate power by diverting water from the channel of the Presumpscot River into a "power canal," through the generating turbines, and then back into the river channel through a "tailrace channel," thereby bypassing a section of the river channel where water not routed through the turbines continues to flow. Pet. Br. 3-4; see Pet. App. A75-A78; J.A. 9-17. In the course of the state certification proceedings, petitioner did not dispute that the Presumpscot River is part of the "navigable waters" subject to the requirements of Section 401(a) of the Clean Water Act. See Pet. Br. 9-10. Petitioner urged, however, that Section 401(a) does not apply to its operations because the facilities do not result in "any discharge into" the Presumpscot River. See *ibid.*; Pet. App. A6, A22, A38.

After considering extensive submissions, DEP issued a Section 401 certification. Pet. App. A74-A140. The certification included, among other things, conditions requiring petitioner to maintain minimum stream flows in the portions of the river bypassed by the projects and conditions requiring Warren to take measures to allow passage for various species of migratory fish. *Id.* at A121-A140. Petitioner appealed DEP's Section 401 certification to the state administrative appeals tribunal, the Maine Board of Environmental Protection (BEP), which affirmed the decision of DEP, *id.* at A35-A73, and rejected petitioner's contention that the facilities do not result in a discharge, *id.* at A40-A42. Petitioner then sought judicial review of the state agency action by initiating a state suit in the Cumberland County Superior Court, which affirmed the BEP determination, *id.* at A19-A34, including its conclusion that petitioner's facilities result in a discharge, *id.* at A22-A25. Petitioner appealed the superior court's decision to the Maine Supreme Judicial Court, which affirmed the superior court's judgment, *id.* at A1-A18, including its conclusion that petitioner's facilities result in a discharge that triggers Section 401's state certification requirement, *id.* at A6-A10.

The Maine Supreme Judicial Court examined the Clean Water Act's description of the term "discharge," CWA § 502(16), 33 U.S.C. 1362(16), and observed that the Act does not "expressly define" the term. The court nevertheless expressed the view that an "addition" is a "fundamental characteristic of any discharge." Pet. App. A6. The court then determined that petitioner's hydroelectric generating facilities result in an "addition" because they "remove the water of the river from its natural course, exercise private control over the water and then *add* the water back into the river." *Id.* at A8. The court rejected petitioner's contention that the term "discharge" under Section 401 is limited to the "discharge of a pollutant" or "discharge of pollutants," observing that the

Clean Water Act defines "discharge" expansively to "include[]" those more limited phrases. *Id.* at A8-A10.

Petitioner proceeded with the FERC license proceedings while it pursued its state appeals. While the superior court action was pending, FERC issued new licenses for all five projects. See *S.D. Warren Co.*, 105 F.E.R.C. ¶¶ 61,009-61,013 (Oct. 2, 2003). In each license order, FERC stated that the license was "subject to the water quality certification conditions" that DEP had imposed, which were attached to each order. See, *e.g.*, 105 F.E.R.C. ¶ 61,013, at 61,144. Petitioner sought administrative rehearing, which FERC denied. *S.D. Warren Co.*, 106 F.E.R.C. ¶ 61,087 (Jan. 29, 2004). Petitioner then sought judicial review of FERC's license orders in the United States Court of Appeals for the D.C. Circuit. Petitioner did not pursue its present claim—that its dams do not result in discharges for Section 401 purposes—in either the proceedings before FERC or in the court of appeals. The court of appeals affirmed FERC's orders in an unpublished per curiam opinion. *S.D. Warren Co.* v. *FERC*, No. 04-1105 (D.C. Cir. May 6, 2005).[2]

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[2] The completion of the federal licensing and judicial review proceedings does not appear to pose a significant obstacle to this Court's review of the federal question. The Maine Supreme Judicial Court's resolution of that question is final, see 28 U.S.C. 1257(a), and the issue was not litigated or decided in the now-completed federal proceedings. Although Section 401(d) envisions that FERC shall incorporate DEP's state water quality certification in its licensing order, 33 U.S.C. 1341(d), and FERC did precisely that in issuing licenses for petitioner's facilities, that fact does not render this Court's review of the state court's decision merely advisory or otherwise render the federal issue moot. FERC has discretion to consider new developments even after it issues a license; it may reopen and amend its license orders "upon mutual agreement between the licensee and [FERC] after thirty days' public notice." FPA § 6, 16 U.S.C. 799. Accordingly, if this Court were to accept petitioner's contention that its facilities do not result in any discharge triggering Section 401's state certification requirement, petitioner could petition FERC for appropriate relief.

SUMMARY OF ARGUMENT

The Clean Water Act requires an applicant for a federal license to obtain a state water quality certification if the licensed activity "may result in any discharge into the navigable waters." CWA § 401(a)(1), 33 U.S.C. 1341(a)(1). The pivotal issue in this case is whether petitioner's hydroelectric generating facilities, which require FERC licensing, may result in such a "discharge." Congress made clear that the term "discharge" *includes* but is not limited to a "discharge of pollutants"—a statutory term of art—but otherwise left the term "discharge" undefined. See CWA §§ 502(12) and (16), 33 U.S.C. 1362(12) and (16). Congress thereby indicated its intent that the ordinary meaning of the word discharge—"a flowing or issuing out" (*Webster's Third New International Dictionary* 644 (1993) (*Webster's Third*); *Webster's Second New International Dictionary* 742 (1958) (*Webster's Second*))—would determine the reach of that term.

Petitioner's hydroelectric generating facilities necessarily result in a "discharge" within the ordinary meaning of that term. It is common parlance to speak of a release of water from a dam and reservoir as a "discharge," and that usage accurately describes the water releases at issue here. Petitioner's facilities divert and impound Presumpscot River water for purposes of power generation, and then return the water into a different portion of the river channel. The impounded water, upon release, "flow[s] or issue[s] out" of the facility and into the concededly navigable river channel. Contrary to petitioner's primary contention (Pet. Br. 17), the Clean Water Act imposes no requirement that a "discharge" must result in the "addition" of "a pollutant or at least something similar to a pollutant." By providing that the term "discharge" "*includes*," as opposed to "means," the "discharge of a pollutant"—*i.e.*, "any addition of any pollutant to navigable waters from any point source," CWA § 502(12), 33 U.S.C. 1362(12)—Congress necessarily rejected the narrow interpre-

tation proffered by petitioner, and instead manifested its intent that the term "discharge" would have its normal meaning, *i.e.*, any "flowing or issuing out" of water from the facility into the river channel, without regard to whether that "discharge" also results in an "addition" of pollutants or of anything else.

That conclusion is consistent with this Court's decision in *PUD No. 1* v. *Washington Department of Ecology*, 511 U.S. 700 (1994), which correctly assumed that a similar hydroelectric facility would result in a discharge for Section 401 purposes. It is also consistent with the Court's decision in *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), which did not address the requirements of Section 401 but nevertheless suggests that there is a distinction between a "discharge" and an "addition." Construing the term "discharge" according to its ordinary meaning provides a clear rule and fulfills Congress's express objective of ensuring that federal licensing authorities are attentive to the rights that each State retains under the Clean Water Act to regulate not only the "discharge of pollutants," but also any "discharges" that may result in "pollution." See CWA §§ 101(b), 510, 33 U.S.C. 1251(b), 1370.

ARGUMENT

PETITIONER'S OPERATION OF ITS HYDROELECTRIC FACILITIES RESULTS IN A "DISCHARGE INTO THE NAVIGABLE WATERS" FOR PURPOSES OF SECTION 401(a) OF THE CLEAN WATER ACT

An applicant for a FERC license must obtain a state water quality certification if the licensed activity "may result in any discharge into the navigable waters." CWA § 401(a), 33 U.S.C. 1341(a). Congress expansively defined the crucial term "discharge" by inclusion, CWA § 502(16), 33 U.S.C. 1362(16), not limitation, manifesting its intent that the term should be construed in light of its ordinary meaning—"a flow-

ing or issuing out." *Webster's Third* 644; *Webster's Second* 742. Under that definition, the hydroelectric facilities at issue here, which release impounded water back into a river channel, clearly result in a discharge for purposes of Section 401. Contrary to petitioner's central submission, the discharge need not "add" pollutants, or anything else, to the river. This Court's decisions, as well as the structure and purposes of the Clean Water Act and its legislative history, all support interpreting the term "discharge" according to its ordinary meaning, which provides a clear administrative rule to guide federal and state agency proceedings.

A. The Term "Discharge" In Section 401(a) Should Be Interpreted In Light Of Its Ordinary Meaning

The Clean Water Act provides a series of carefully crafted definitions for purposes of applying the Act's complex, and in some cases highly technical, provisions. See CWA § 502, 33 U.S.C. 1362. Nearly all of the 23 definitions set forth precise meanings, and many are terms of art. The Clean Water Act's definition of "discharge" is distinctive, because that term is not comprehensively delineated but instead is defined only by inclusion: "The term 'discharge' when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants." CWA § 502(16), 33 U.S.C. 1362(16) (emphasis added).

That distinctive characteristic stands in sharp relief to the Act's more circumscribed definitions of the subsidiary terms: "The term 'discharge of a pollutant' and the term 'discharge of pollutants' each *means* * * * any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. 1362(12) (emphasis added). The Act similarly defines the key terms "pollutant," "navigable waters," and "point source" to "mean" particular things. See CWA § 502(6), (7), and (14), 33 U.S.C. 1362(6), (7), and (14).

The Clean Water Act's inclusive definition of "discharge" indicates that the term is not limited to—*i.e.*, does not "mean"

—the discharge of one or more pollutants. See, *e.g.*, *Chickasaw Nation* v. *United States*, 534 U.S. 84, 89 (2001) ("To 'include' is to 'contain' or 'comprise as part of a whole.'") (citation omitted). That singular and distinctive use of the word "includes" rather than "means" among the Act's 23 definitions demonstrates in bold relief Congress's unmistakable intent and understanding that the term "discharge" would encompass "discharges" beyond those that qualify as the "addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. 1362(12). See *Helvering* v. *Morgan's Inc.*, 293 U.S. 121, 125 n.1 (1934) ("The natural distinction would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition.").

The Clean Water Act's inclusive definition is also revealing in another central respect. That formulation expresses Congress's intention that the term "discharge" should be construed according to its ordinary meaning and not as a statutory term of art. Congress made clear that the term "discharge" describes a class of activities that "includes" two such statutory terms of art—the synonymous terms "discharge of a pollutant" and "discharge of pollutants"—but it otherwise left the membership of the class undefined. By so doing, Congress expressed its intention that the ordinary meaning of the term "discharge" would delimit the scope of that term. See, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994) (an undefined statutory term is construed "in accordance with its ordinary or natural meaning").

B. The Ordinary Meaning Of Discharge—"A Flowing Or Issuing Out"—Encompasses A Hydroelectric Facility's Release Of Diverted Water To A River Channel

The term "discharge" can have a variety of meanings depending on the context. But when the term "discharge" is used in the water-related context that Section 401(a) de-

scribes, it means "a flowing or issuing out." *Webster's Third* 644; *Webster's Second* 742. See, *e.g.*, 4 *The Oxford English Dictionary* 732 (2d ed. 1989) ("The act of sending out or pouring forth."); *Random House Dictionary of the English Language* 561-562 (2d ed. 1987) ("a sending or coming forth, as of water from a pipe"); *PUD No. 1*, 511 U.S. at 725 (Thomas, J., dissenting) ("The term 'discharge' is not defined in the [Clean Water Act,] but its plain and ordinary meaning suggests 'a flowing or issuing out,' or 'something that is emitted.'") (quoting *Webster's Ninth New Collegiate Dictionary* 360 (1991)).

Hydroelectric dams, which typically impound water for power production, necessarily produce "a flowing or issuing out" of water when they return the diverted water to the river channel. Indeed, releases of water from dams and reservoirs are characteristically and routinely described as "discharges." See, *e.g.*, *United States* v. *James*, 478 U.S. 597, 599 (1986) ("Enormous underwater portals set within the Millwood Dam, called 'tainter gates,' allow the discharge of water from the Reservoir into a spilling basin below."); *Arizona* v. *California*, 373 U.S. 546, 619 n.25 (1963) (Harlan, J., dissenting in part) (referring to persons who may "take water out of the stream which has been discharged from the reservoir"); *United States* v. *Arizona*, 295 U.S. 174, 181 (1935) ("Parker Dam will intercept waters discharged at Boulder Dam."); *Wyoming* v. *Colorado*, 259 U.S. 419, 482 (table showing "Discharge of Laramie River at Pioneer Dam"), modified, 260 U.S. 1 (1922), vacated, 353 U.S. 953 (1957).[3]

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[3] Indeed, in the Court's only previous case involving Section 401, the petitioner, a prospective owner-operator of a proposed hydroelectric facility, readily conceded that the facility would result in a "discharge" for purposes of that Section because the facility would release "water at the end of the tailrace [of the proposed dam] after the water has been used to generate electricity." See *PUD No. 1*, 511 U.S. at 711; note 10, *infra*. The Court embraced that incontestably reasonable concession, and held that the State of Washington could impose conditions under Section 401(d) that were not strictly tied to such project "discharges." *Id.* at 712. The Court expressed no doubt that, when a

Petitioner's hydroelectric generating facilities, which consist of a familiar arrangement of dams, impoundments, a "power" canal, turbines, and a by-pass channel, see J.A. 10-17, necessarily release impounded water into the channel of the Presumpscot River and therefore result in a "flowing or issuing out" of that water. As a matter of ordinary usage, the operation of petitioner's hydroelectric generating facilities results in a "discharge" of diverted water, used to power turbines, when the water is returned to the river channel. That discharge, in turn, triggers Section 401's state certification requirement, which ensures that the federal licensing authorities properly take account of the impact of those water releases on the State's "primary responsibilities" to regulate "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." CWA §§ 101(b), 502(19), 33 U.S.C. 1251(b), 1362(19).

C. The Term "Discharge" Does Not Require An "Addition"

The Maine Supreme Judicial Court correctly concluded that petitioner's hydroelectric generating facilities result in a "discharge" for purposes of Section 401, but it did so on a mistaken rationale. The supreme judicial court asserted, without lexicographical reference, that "[a]n 'addition' is the fundamental characteristic of any discharge." Pet. App. A6. Applying that incorrect understanding, it then concluded that the release of water constituted a "discharge" because the waters impounded by petitioner's dams "have lost their status as *waters of the United States*" and thus an "addition" to navigable waters occurs when they are "redeposited into the natural course of the river." *Id.* at A8; see *id.* at A6-A8, A10. The court's reasoning was erroneous, but its ultimate conclusion was sound.

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dam releases impounded water through a tailrace, head-gate, sluice-gate, or other structure, a "discharge" occurs within the plain meaning of the term.

1. As an initial matter, the supreme judicial court erred in holding that the water impounded by petitioner's dams loses its status as navigable waters and is then "added" back to those waters after it passes through the dams. EPA has consistently construed the phrase "navigable waters" (*i.e.*, "the waters of the United States," CWA § 502(7), 33 U.S.C. 1362(7)) to include "impoundments of waters otherwise defined as waters of the United States." 40 C.F.R. 122.2. Accordingly, water impounded by and passing through a dam generally does not lose its character as "waters of the United States." See, *e.g.*, *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 586, 589 (6th Cir. 1988). That conclusion is supported by longstanding agency interpretation and is entitled to substantial deference.[4]

The supreme judicial court thus erred in concluding that water passing through a dam is "added" to the waters of the United States when it reenters the natural channel of the river. That error warrants correction, because the lower court's analysis of that issue is irreconcilable with the settled understanding, adopted by EPA in 1973 and consistently maintained thereafter, that dams generally do not "add[]" pollutants to the navigable waters "from the outside world" and are therefore not subject to NPDES permitting requirements, even though the water passing through the dams may

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[4] See, *e.g.*, Memorandum from Ann R. Klee, EPA, et al., to Regional Administrators, *Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers* 10 (Aug. 5, 2005) (*Agency Interp.*) <http://www.epa.gov/ogc/documents/water_transfers.pdf.> ("EPA's longstanding position has been that dams and hydropower facilities do not 'add' pollutants when they are merely moving water from one location to another within the same waterbody."); *id.* at 18 n.18 ("the dam merely conveys water from one location to another within the same waterbody"); U.S. Br. as *Amicus Curiae* at 28, 31, *National Wildlife Fed'n* v. *Consumers Power Co.*, No. 87-1441 (6th Cir.) (filed Sept. 1987) ("waters do not change their character as waters of the United States merely as a result of their manipulation" by a hydroelectric dam; "[t]he mere change in their movement, flow, or circulation does not change the character of these waters as waters of the United States").

itself contain pollutants. See *Consumers Power Co.*, 862 F.2d at 584-588; *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 165, 168-169 & nn.39-40, 174-177 (D.C. Cir. 1982).[5]

2. More fundamentally, the supreme judicial court also erred in assuming that an "addition" is necessary in order for a "discharge" to occur for purposes of Section 401(a). When "discharge" is construed in light of its ordinary meaning, as it must be, an "addition" is *not* a fundamental characteristic of that term. The term "discharge," in the relevant context of water, refers to the physical release of the water from some confining source or location, *viz.*, "a flowing or issuing out." As demonstrated above, dictionaries uniformly define a "discharge" of water based on the characteristic of physical release from confinement and not on the basis of an "addition." See pp. 13-14, *supra*. A discharge may commonly *result* in an addition of some sort, but the ordinary meaning of "discharge" denotes the "flowing or issuing out" and not any consequent "addition," no matter how common that result may be.

3. Petitioner, consistent with the reasoning of the court below, does not suggest that the ordinary meaning of "discharge" requires an "addition." Rather, it derives that gloss from other provisions of the Clean Water Act. Petitioner

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[5] See also *Agency Interp.* 10 ("EPA's longstanding position has been that dams and hydropower facilities do not 'add' pollutants when they are merely moving water from one location to another within the same waterbody."); Reply Br. for Fed. Appellant at 4 n.2, *National Wildlife Federation* v. *Gorsuch, Admin., EPA*, Nos. 82-1335 et al. (D.C. Cir.) (filed July 1982) ("EPA does not require an NPDES permit for discharges into navigable waters from navigable waters."); *id.* at 14 ("Since 1973, EPA has consistently maintained that the dam-induced water quality changes at issue here do not involve the discharge of pollutants from a point source."). Of course, when dams or other water diversion facilities add pollutants such as oil and grease to water passing through the diversion structure into the downstream water, or when water is removed from the waters of the United States and utilized for cooling or other industrial purposes before being returned, NPDES permits are required. *Consumers Power*, 862 F.2d at 588; *Gorsuch*, 693 F.2d at 165 n.22; *Agency Interp.* 10 n.12; see 40 C.F.R. 122.45(g)(4).

asserts that the Act's inclusive definition of "discharge" does not adequately identify the limits of that term. See Pet. App. A6; Pet. Br. 15; see also *North Carolina* v. *FERC*, 112 F.3d 1175, 1188 (D.C. Cir. 1997), cert. denied, 522 U.S. 1108 (1998). But instead of following the normal course of statutory construction and consulting a dictionary, see, *e.g.*, *FDIC*, 510 U.S. at 476, it extracts a limiting principle from the Clean Water Act's definition of a *different* term—"discharge of a pollutant." See CWA § 502(12), 33 U.S.C. 1362(12) (defining the term in relevant part as "any addition of any pollutant to navigable waters from any point source").

According to petitioner, the definition of "discharge of a pollutant" indicates that "Congress equated the notion of a 'discharge' with the notion of 'any addition . . . from any point source.'" Pet. Br. 15. See *id.* at 16-17 ("Congress associated a 'discharge' with an 'addition' into the water of a pollutant or at least something like a pollutant."). That reasoning, however, does not withstand scrutiny. The Clean Water Act defines "discharge of a pollutant" as a statutory term of art. Congress's specification that the general term "discharge" *includes* that term of art makes clear that the latter is encompassed within the former, but it says nothing about the outer reach of the general term, which therefore must be construed according to its ordinary meaning.

Petitioner's error is especially evident when considered in light of the history of the Clean Water Act. Congress employed the undefined term "discharge" in the pre-1970 Federal Water Pollution Control Act and, by leaving that term completely undefined, necessarily used it in its ordinary sense. See 33 U.S.C. 466a (Supp. V. 1969) (authorizing joint investigations of "discharges of any sewage, industrial wastes, or substance which may adversely affect such waters"). Congress also employed the undefined term "discharge" in provisions of the 1970 version of the Federal Water Pollution Control Act, including the provision that later became Section

401(a) (see pp. 3-4, *supra*), again necessarily employing that term in its ordinary sense. See 33 U.S.C. 1171(b) (1970).[6]

When Congress enacted the Federal Water Pollution Control Act Amendments of 1972, it continued to employ the unadorned term "discharge" in Section 401(a). 33 U.S.C. 1341(a). But at the same time, Congress defined the phrase "discharge of a pollutant" as a statutory term of art for use in new provisions of the Act, where the specific and technical meaning of that defined term plays a crucial role in determining the reach of those provisions. See, *e.g.*, CWA § 301(a), 33 U.S.C. 1311(a) ("the discharge of any pollutant by any person shall be unlawful"); CWA § 402(a), 33 U.S.C. 1342(a) (EPA may "issue a permit for the discharge of any pollutant"). By so doing, Congress carefully limited the reach of those provisions to "discharges" that result in the "addition" to "navigable waters" of "pollutants" from a "point source." See, *e.g*, *California*, 426 U.S. at 203-205 (describing the operation of Section 301 and 402 with reference to the statutory definitions).

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[6] Congress did set out a specific definition of "discharge" for limited use in two other sections of the 1970 Act, those dealing with "Control of pollution by oil," 33 U.S.C. 1161 (1970), and "Control of sewage from vessels," 33 U.S.C. 1163 (1970). In each instance, Congress extended the term "discharge" to the limits of, and perhaps beyond, its ordinary meaning, stating that the term "includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping." 33 U.S.C. 1161(a)(2), 1163(a)(9) (1970). See H.R. Rep. No. 940, 91st Cong., 2d Sess. 33 (1970) ("[t]he definition of 'discharge' is designed to cover by its broad terms all possible means of fouling the waters with oil"). That definition includes, for example, even the unanticipated passive seepage from an abandoned tank or drum. The Clean Water Act has retained those limited-use definitions. See CWA §§ 311(a)(2), 312(a)(9), 33 U.S.C. 1321(a)(2), 1322(a)(9). The inclusion of the phrase "not limited to" is, of course the draftsman's device to avoid any implication that canons such as *inclusio unius est exclusio alterius*, *noscitur a sociis*, and *ejusdem generis* should apply in light of the enumeration of seven related items. See Bryan A. Garner, *A Dictionary of Modern Legal Usage* 432 (2d ed. 1995). Those canons are not an issue in the case of Section 502(16), which "includes" only a single term and its synonymous plural form. 33 U.S.C. 1362(16).

Congress specifically clarified the relationship between the terms "discharge" and "discharge of a pollutant," thereby eliminating any confusion that might otherwise have arisen from its use of "discharge" in its ordinary sense in some Clean Water Act provisions and its use of "discharge of a pollutant" as a statutory term of art in the Act's other provisions. In particular, Congress made clear that the broader and more expansive term "discharge" includes the more circumscribed term "discharge of a pollutant" as well as its synonymous plural "discharge of pollutants." CWA § 502(16), 33 U.S.C. 1362(16). That congressional determination is entirely consistent with the ordinary meaning of discharge—"a flowing or issuing out"—which necessarily includes "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. 1362(12).

It would be irrational, especially in light of the statutory evolution of those terms, to conclude that, because Congress clarified that a general term "includes" a more circumscribed term of art, the general term is somehow confined by the same limitations. If Congress had meant to say that a "discharge" is an "addition . . . from a point source" (Pet. Br. 15) or an "addition" of a "pollutant" or "something similar" (*id.* at 17), it could have, and would have, simply said so. Instead, Congress preserved the general term "discharge" for use in statutory provisions, such as Section 401, when it intended to convey the ordinary meaning of that term, and defined the term of art "discharge of a pollutant" for use in other provisions, such as Sections 301 and 402, when it intended to convey the more circumscribed meaning. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in

the disparate inclusion or exclusion." *Bates* v. *United States*, 522 U.S. 23, 29 (1997) (citation omitted).[7]

4. Petitioner further argues that "[i]t stretches credulity to contend that Congress somehow envisioned a river flowing through a dam as a river 'discharging into' itself." Pet. Br. 17. But that argument ignores the role of the dam. A "flowing or issuing out" will always be "out" of something and "into" something, and this Court's own decisions confirm that it is common usage to say that a dam or reservoir "discharges into" the very river that it impounds. See *PUD No. 1*, 511 U.S. at 709 (the proposed Elkhorn Hydroelectric Project "may result in discharges into the Dosewallips River"). That usage accurately describes what physically takes place: The hydroelectric facility diverts water from the river channel, passes the water through turbines to generate power, and "then return[s] the water to the river below the bypass reach." *Ibid.* The facility thereby returns the water by "discharge into" the same river channel from which it was withdrawn. CWA § 401(a), 33 U.S.C. 1341(a).[8]

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[7] Petitioner obtains no support for a contrary conclusion from *Chickasaw Nation*, *supra*, or *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941). See Pet. Br. 17. *Chickasaw Nation* recognizes, unhelpfully for petitioner, that to "include" is to "comprise *as part of* the whole," 534 U.S. at 89 (emphasis added), and goes on to hold that a provision that "included" an illustrative list did not extend, by virtue of one of the listed items, the reach of that provision further than its otherwise plain meaning would allow, *id.* at 89-91. Here, no such question is presented because the term "discharge" is obviously broader than the "discharge of a pollutant," and there is no illustrative list. In *Phelps Dodge Corp.*, the Court rejected the notion that Congress intended to limit a broad statutory phrase by "including" an illustration of its use, stating that such a construction would "shrivel a versatile principle to an illustrative application." 313 U.S. at 189. As the Court observed, "[t]he word 'including' does not lend itself to such destructive significance." *Ibid.*; see Garner, *supra*, at 431 ("including" should not "be used to introduce an exhaustive list, for it implies that the list is only partial").

[8] Section 401(a)'s reference to "navigable waters," which means "the waters of the United States," CWA § 502(7), 33 U.S.C. 1362(7), denotes that Section 401 applies only if the discharge flows into waters that are subject to federal

Even if there were any room for doubt about the applicability of Section 401(a) to hydroelectric facilities, such doubt would have to be resolved in favor of EPA's interpretation. EPA has consistently maintained that the licensing of hydroelectric facilities under the Federal Power Act is subject to the requirements of Section 401(a). EPA has taken that position in an agency guidance document, in communications with FERC, and in construing its own authority to issue certifications under Section 401(a) when no state agency has authority to do so.[9] That longstanding administrative construction of the Act is entitled to deference. See, *e.g.*, *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002).

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regulation. For example, Section 401 would not apply if a federally licensed facility withdrew water from a river and then discharged all of that water into a municipal water system. In this case, petitioner's facilities discharge water "into," as opposed to diverting water away from, the Presumpscot River, which are waters subject to federal regulation. Cf. *North Carolina*, 112 F.3d at 1189 (holding that a withdrawal "resulting in a decrease in the volume of a preexisting discharge is not an activity that 'results in any discharge'"). The fact that the diverted water remains, for purposes of federal regulation, part of "the waters of the United States," see note 4, *supra*, has no bearing on whether the release of the water from the facility is a "discharge into the navigable waters." Section 401 focuses on the *potential* of a "discharge" and not on *what* is being discharged.

[9] See, *e.g.*, EPA, *Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes* 20 (Apr. 1989) (EPA "has identified five federal permits and/or licenses which authorize activities which may result in a discharge to the waters," including "licenses required for hydroelectric projects issued under the Federal Power Act"); Letter from Jonathan Z. Cannon, EPA, et al., to Hon. Lois D. Cashell, FERC, re: *Virginia Electric and Power Co.*, at 4 (Oct. 24, 1996) (operation of hydroelectric dam "'may result,' and indeed, does result, in a 'discharge' of water over and through the dam" and thus "trigger[s] the requirement of a Section 401 certification from" the relevant State); Letter from David A. Fierra, EPA, to Dean Marriott, Maine Dep't of Envtl. Prot. at 1 (Jan. 24, 1991) ("it is the Region's position that EPA is the Section 401 certifying body for purposes of the hydro project relicensing").

D. This Court's Decisions Support Interpreting The Term "Discharge" According To Its Ordinary Meaning

Petitioner gives scant attention to this Court's decision in *PUD No. 1*, which held, in circumstances strikingly similar to this case, that a state-issued Section 401 certification for a hydroelectric project may properly impose conditions on the project as a whole—and not just its discharges. See 511 U.S. at 710-723. In that case, as here, the state-imposed conditions included minimum stream flows to ensure compliance with state water quality standards. See *ibid.* To be sure, the petitioner in that case did not dispute that the project resulted in a "discharge," see note 3, *supra*, but the petitioner also did not overlook that point.[10] The Court, in its "thorough analysis" (511 U.S. at 723 (Stevens, J. concurring)), expressed no doubt that the project resulted in a "discharge." The two dissenting Justices disagreed on the appropriateness of the minimum stream flow condition, but expressly recognized that the term "discharge" should be construed in light of its ordinary meaning as "a flowing or issuing out," *id.* at 725 (Thomas, J., dissenting). Against that backdrop, *PUD No. 1* stands as a substantial obstacle to any conclusion that a hydroelectric project does not result in a "discharge."

Rather than confronting *PUD No. 1*, petitioner focuses on this Court's decision in *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), which did not address Section 401 and its use of the general

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[10] The petitioner in that case urged that Congress had left the term "discharge" undefined and that it should therefore be interpreted in light of its "standard dictionary definition" of "to give outlet to: pour forth: emit (the river [*discharges*] its waters into the bay)." 92-1911 Pet. Br. at 22-23 (quoting *Webster's Third New International Dictionary* 649 (1971)). The United States advised in its brief amicus curiae that "when the operator of a dam releases water through [a release structure] it has caused a discharge within the meaning of Section 401," noting that "Congress employed the term 'discharge' * * * more broadly than the term 'discharge of a pollutant.'" 92-1911 U.S. Br. at 14-15 & n.4.

term "discharge," but instead addressed Section 402, which uses the more circumscribed term "discharge of a pollutant." The Court's decision in *Miccosukee* is relevant here only in two limited respects, neither of which is helpful to petitioner.

First, *Miccosukee* illustrates why Congress drew its definitional distinction. Section 401, which uses the broader term "discharge," directs that, whenever federal authorities license an activity that may result in any "flowing or issuing out" of anything into navigable waters, they obtain input from the State where the release takes place to ensure that the release will not interfere with the State's broad retained authority to regulate "the man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of water." CWA §§ 101(b), 502(19), 33 U.S.C. 1251(b), 1362(19). By contrast, Section 402—the provision at issue in *Miccosukee*—involves only the issuance of federally mandated NPDES permits for the "addition of [a] pollutant to navigable waters from [a] point source." CWA §§ 402(a), 502(12), 33 U.S.C. 1342(a), 1362(12). Section 401's broad and inclusive reach, requiring examination of any "discharge" that might lead to "pollution," thus ensures that federally licensed projects will comply with state water quality standards even when the more targeted and specific requirements of the NPDES program are not applicable.[11]

Second, the Court's decision in *Miccosukee* usefully illuminates the difference between a "discharge" and an "addition." In discussing "additions," the Court noted by analogy that

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[11] As has been explained, EPA does not require NPDES permits for hydroelectric dams that merely discharge diverted water back into a navigable river channel, unless that discharge also involves the addition of a pollutant from the outside world. See note 5, *supra*. Section 401's state water quality certification process provides the appropriate means for addressing the broader problems associated with any "man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of water," CWA § 502(19), 33 U.S.C. 1362(19), that might result from the impoundment and release of diverted water. See *Gorsuch*, 693 F.2d at 161-174.

> [i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot.

541 U.S. at 110 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *New York*, 273 F.3d 481, 492 (2d Cir. 2001)). Though not an "addition," the act of "pour[ing the soup] back into the pot" is plainly a "discharge" within the ordinary meaning of that term.[12]

E. The Clean Water Act's Purpose and Legislative History Support The Conclusion That Petitioner's Facilities Result In A "Discharge Into the Navigable Waters"

Section 401 is one part of the Clean Water Act's comprehensive water pollution control program, which seeks to coordinate federal and state efforts to ensure clean water. The Act places federal limitations on the "discharge of *pollutants*," while continuing a policy recognizing "the *primary* responsibilities and rights of States to prevent, reduce, and eliminate *pollution*." See CWA § 101(a)(1) and (b), 33 U.S.C. 1251(a)(1) and (b) (emphasis added). The Act preserves the broad power of a State to develop its own more stringent standards and limitations, stating that nothing in the Act's provisions shall preclude or deny the right of any State "to adopt or enforce (A) any standard or limitation respecting *discharges of pollutants*, or (B) any requirement respecting control or *abatement of pollution*," in addition to or more

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[12] Petitioner's reference to EPA's regulatory guidance document respecting water transfers (Pet. Br. 22-23) is inapposite because that document does not address the scope of Section 401. Rather, that document explains EPA's view that Section 402's NPDES permitting program is not applicable to water control facilities that merely convey or connect navigable waters but do not involve an addition of any pollutants from a point source. See *Agency Interp.*, *supra*. That view is consistent with EPA's position on dams and its position here. See *id.* at 8, 10-12; notes 4-5, *supra*.

stringent than what the federal law requires. See CWA § 510, 33 U.S.C. 1370 (emphasis added).

Congress clearly understood that activities that do not result in discharges of pollutants may nevertheless contribute to pollution. Congress also knew that, in the absence of congressional direction, principles of federal preemption might well exempt many federally licensed activities—including the generation of hydroelectric power—from state environmental regulation. See *California* v. *FERC*, 495 U.S. 490, 506-507 (1990); *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152, 175-176 (1946). Congress accordingly adopted Section 401 to ensure that federally licensed activities would not escape state regulation. Section 401 expressly enables a State to apply its federally mandated water-pollution-control program to those activities. See *Alabama Rivers Alliance* v. *FERC*, 325 F.3d 290, 292-293 (D.C. Cir. 2003); *American Rivers, Inc.* v. *FERC*, 129 F.3d 99, 111 (2d Cir. 1997).

As petitioner appears to acknowledge (Pet. Br. 4, 23), even if a hydroelectric generating facility does not add pollutants to navigable waters, the discharge of diverted or impounded water may cause "pollution" by producing a "man-made or man-induced alteration" of water quality. CWA § 502(19), 33 U.S.C. 1362(19). See generally *Gorsuch*, 693 F.2d at 161-174. Among other things, the diversion and impoundment of water "can lower dissolved oxygen concentrations by reducing natural reaeration, increasing time of travel, increasing water temperature, and creating settling basins for sediment and nutrients." Pet. App. A114 (DEP findings). In the present case, it is undisputed that reaches of Presumpscot River do not meet Maine's dissolved-oxygen standards and that petitioner's facilities "cause or contribute to the violation[s]." *Id.* at A114-A115 (DEP findings); *id.* at A56-A57 (BEP findings).

Section 401 squarely addresses the need for federal licensing authorities to take account of a State's important interest in abating pollution that might arise in exactly these circumstances. If petitioner's facilities are not subject to Section

401, the State would be without an important mechanism to regulate the pollution caused by those facilities and their discharges. That result would be contrary to Congress's express policy "to recognize, preserve, and protect" the rights of each State "to prevent, reduce, and eliminate pollution." CWA § 101(b), 33 U.S.C. 1251(b).[13]

The legislative history of the Clean Water Act fully supports Congress's textually evident objectives. Senator Cooper, a principal sponsor of the initial legislation that imposed the requirement now included in Section 401(a), spoke of the need for state certification during the floor debate. He observed that "the Federal Government contributes to water pollution in its licensing activities over such things as nuclear power plants, [and] *hydroelectric power plants licensed by the Federal Power Commission.*" See 115 Cong. Rec. 28,971 (1969) (emphasis added). Senator Cooper stated that the legislation would require, "*without exception*, that all Federal activities that have any effect on water quality be conducted

[13] Contrary to petitioner's suggestions (Pet. Br. 23-28), neither Section 304(f)(2)(F) nor Section 511(c)(2) of the Clean Water Act, 33 U.S.C. 1314(f)(2)(F), 1371(c)(2), suggests anything to the contrary. Section 304(f) directs EPA to provide guidance for "identifying and evaluating the nature and extent of nonpoint sources of pollutants, and * * * processes, procedures, and methods to control pollution resulting from," among other activities, "the construction of dams." 33 U.S.C. 1314(f). The fact that the "construction of dams," as well as "all construction activity" (33 U.S.C. 1314(f)(2)(C) and (F)), may result in nonpoint source pollution provides no basis for exempting the operation of those dams from Section 401's express requirements. Section 511(c)(2) provides that nothing in the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, authorizes federal licensing agencies to: (a) review the "adequacy" of state water quality certifications or other requirements established under the Act; or (b) impose effluent limitations beyond those established in the Act as a condition of licensing. See 33 U.S.C. 1371(c)(2). A determination that Section 401 applies to discharges from federally licensed dams in no way suggests that NEPA authorizes or requires FERC to evaluate the "adequacy" of state-imposed water quality conditions or to second-guess applicable effluent limitations.

so that water quality standards will be maintained." *Ibid.* (emphasis added). Those remarks do not stand alone.[14]

When Congress recast the former Section 21(b) as Section 401 of the Federal Water Pollution Control Act in 1972, the Senate Report on the new legislation again confirmed Congress's intent that the state certification requirement would apply to Federal Power Act licenses. See S. Rep. No. 414, 92d Cong., 1st Sess. 69 (1971). The Senate Report states that Section 401 "continues the authority of the State * * * to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State or jurisdiction of the interstate agency" and that "[s]hould such an affirmative denial occur no license or permit could be issued by such Federal agencies as the * * * *Federal Power Commission* * * * unless the State action was overturned in the appropriate courts of jurisdiction." *Ibid.* (emphasis added).

When Congress enacted the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, it also reaffirmed its desire for a broad reading of Section 401. As part of those amendments, Congress modified Section 401 to add a reference to Section 303 and state water quality standards, which had been inadvertently left out of the original version. See § 64, 91 Stat. 1599. The Senate Report explains that the "amendment follows the original congressional intent and clarifies that * * * Section 303 was intended to be part of the control mechanism available to the States for protection of State water quality." S. Rep. No. 370, 95th Cong., 1st Sess. 72-73 (1977); see H.R. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977). That history confirms that Congress enacted Section 401 not

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[14] For example, the House Report responded to a concern that the provision would apply selectively to nuclear power plants and thereby place nuclear power at an "undesirable" competitive disadvantage. The report stated that "this concern is met by the fact that a Federal license or permit of some kind is required for almost all electric generating plants." See H.R. Rep. No. 127, 91st Cong., 1st Sess. 7 (1969).

as an adjunct to the new federal controls on the "discharge of pollutants," but to continue the existing program to empower States to regulate any "discharge" from federally licensed facilities that cause pollution.[15]

In sum, the Clean Water Act's specific text, this Court's decisions, and the purposes that Congress sought to achieve are all in alignment. Petitioner's operation of its hydroelectric facilities results in a "discharge" for purposes of Section 401(a) of the Clean Water Act.

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[15] Petitioner ignores those straightforward statements of congressional intent, and instead proposes a convoluted and unsatisfying explanation for Congress's use of the term "includes." See Pet. Br. 29-33. Petitioner observes that the original, but not enacted, Senate bill defined "discharge" to "mean," among other things, the "addition" of pollutants to navigable waters, see *id.* at 29-30 (citing S. 2770, 92d Cong., 1st Sess. § 2 (1971) (proposed § 502(n)). Petitioner posits that Congress substituted the word "includes" in the final definition, enacted in Section 502(16), in conjunction with an abandoned legislative effort to include a "thermal discharge" as a type of discharge for purposes of Section 401, but not for Section 402's NPDES permitting requirements. Petitioner speculates that Congress used the term "includes" inadvertently, *i.e.*, as a vestige of the failed legislative proposal, and not deliberately to give Section 401 broader scope than Section 402. See Pet. Br. 32. But such speculation about Congress's "true" intent notwithstanding, inadvertent, but duly enacted, text is not a proper basis for interpreting a statute and is inconclusive in any event. Congress did not need to use the verb "includes" in defining "discharge" to achieve the proposed, but ultimately abandoned, result for "thermal" discharges. The House bill could have achieved that result by defining "discharge" to "mean" the "discharge of pollutants" and "thermal discharges." Accordingly, the legislative history cited by petitioner provides no explanation for Congress's choice of the word "includes" rather than "means" in defining "discharge." The only reasonable conclusion is that Congress meant what it said and employed "includes" to ensure that the term "discharge" would be given a broad construction in keeping with its ordinary meaning.

CONCLUSION

The judgment of the Supreme Judicial Court of Maine should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
SUE ELLEN WOOLDRIDGE
Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
GREER S. GOLDMAN
ELLEN J. DURKEE
JOHN L. SMELTZER
Attorneys

ANN R. KLEE
General Counsel
Environmental Protection Agency

JANUARY 2006

APPENDIX

1. Section 101(a) and (b) of the Clean Water Act, 33 U.S.C. 1251(a) and (b), provides:

Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpointsources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

2. Section 401(a)(1) and (d) of the Clean Water Act, 33 U.S.C. 1341(a)(1) and (d), provides:

Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certifi-

cation required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

* * * * *

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

3. Section 502(6), (12), (16), and (19) of the Clean Water Act, 33 U.S.C. 1362(6), (12), (16), and (19), provides:

Definitions

Except as otherwise specifically provided, when used in this chapter:

* * * * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material

which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

* * * * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * * *

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

* * * * *

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

4. Section 510 of the Clean Water Act, 33 U.S.C. 1370, provides:

State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect

under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Supreme Court, U.S.
FILED
NOV 23 2005
OFFICE OF THE CLERK

No. 04-1527

In The Supreme Court of the United States

S.D. WARREN CO.,

Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MAINE

BRIEF FOR *AMICUS CURIAE* AUGUSTA, GEORGIA, IN SUPPORT OF THE PETITIONER

George A. Somerville
Counsel of Record
TROUTMAN SANDERS LLP
Post Office Box 1122
Richmond, Virginia 23218-1122
(804) 697-1200

James B. Wall
BURNSIDE WALL LLP
Post Office Box 2125
Augusta, Georgia 30903
(706) 722-0768

Counsel for Amicus Curiae
Augusta, Georgia

THE LEX GROUP^{DC} • 1750 K Street, NW • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTION PRESENTED

Does the mere flow of water through an existing dam constitute a "discharge" under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, despite this Court's holding last year in *Miccosukee* that a discharge requires the addition of water from a distinct body of water?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The flow of water through a dam is not a "discharge" within the meaning of Section 401 of the Clean Water Act 3

II. If the Court affirms the judgment below, it should do so on the narrow ground stated by the Maine Supreme Judicial Court 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Catskill Mountains Chapter of Trout Unlimited, Inc.v. New York,
273 F.3d 481 (2d Cir. 2001) 7

City of Augusta, Georgia,
109 F.E.R.C. ¶ 61,210 (2004) 1, 8

Dubois v. United States Department of Agriculture,
102 F.3d 1273 (1st Cir. 1996) ..... iii, *passim*

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 4

IBP, Inc. v. Alvarez,
___ U.S. ___, No. 03-1238 (Nov. 8, 2005) 4

National Mining Association v. United States Army Corps of Engineers,
145 F.3d 1399 (D.C. Cir. 1998) 6

S.D. Warren Co. v. Board of Environmental Protection,
2005 ME 27, 868 A.2d 210 (2005) 7, 8, 9, 11

S.D. Warren Co.,
105 F.E.R.C. ¶ 61,009 11

S.D. Warren Co.,
105 F.E.R.C. ¶ 61,010 11

S.D. Warren Co.,
105 F.E.R.C. ¶ 61,011 10-11

S.D. Warren Co.,
105 F.E.R.C. ¶ 61,012 10

S.D. Warren Co.,
105 F.E.R.C. ¶ 61,013 10

South Florida Water Management District v. Miccosukee Tribe of Indians,
541 U.S. 95 (2004) ..... i, *et passim*

State of North Carolina v. FERC,
112 F.3d 1175 (D.C. Cir. 1997), *cert. denied*,
522 U.S. 1188 (1998) 5, 6, 7

Virginia Electric and Power Company,
77 F.E.R.C. ¶ 61138 (1996) 6-7

STATUTES

33 U.S.C. § 1362(12) 5, 6

33 U.S.C. § 1362(16) 5

Clean Water Act Section 401,
33 U.S.C. § 1341 ..... i, *et passim*

Clean Water Act Section 402, 33 U.S.C. § 1342 ..... 4, 5, 8

Clean Water Act Section 404, 33 U.S.C. § 1344 6

OTHER MATERIALS

58 Fed. Reg. 45008 (1993) 6

U.S. Environmental Protection Agency,
Office of General Counsel Opinion 78-8 5-6

INTEREST OF THE *AMICUS*

Augusta, Georgia (Augusta),[1] is the site of a pre-Civil War dam that recently has become the subject of a dispute under Section 401 of the Clean Water Act (CWA), the same federal law that is at issue in the case at bar. Spanning the Savannah River between Georgia and South Carolina, the Augusta Diversion Dam was built in the 1840's, as was the Augusta Canal, a channel that routes water from the River around the Dam and back into the River again. Augusta uses this long-established canal to furnish water to several mills which, in turn, use the water to generate hydroelectric power. Recent developments in the law place such furnishing of water under the purview of the Federal Energy Regulatory Commission (FERC) and, accordingly, Augusta has applied for a license from FERC (the Augusta Project).

Over the objections of Augusta, the FERC has ordered Augusta to obtain a Section 401 certification from South Carolina, under the theory that water flowing over the Dam constitutes a "discharge into the navigable waters" in South Carolina. *City of Augusta, Georgia*, 109 FERC ¶ 61,210 (2004) (cited in the petition for certiorari in this case). Inasmuch as the license has

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[1] Augusta, Georgia is the official name of the governmental entity created by the consolidation of the former City of Augusta and Richmond County, Georgia. No counsel for any party authored this brief, either in whole or in part; and no person or entity, other than Augusta, made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court.

not yet been issued, this FERC order is not yet final, and the decision in the case at bar may provide guidance on the ultimate resolution of the dispute concerning that order.

Augusta's arguments to the FERC are similar to those presented by petitioner, the S.D. Warren Company (Warren Company), in this case, and a decision in the Warren Company's favor almost certainly would require the FERC to reverse its order requiring Augusta to obtain a Section 401 certification from South Carolina. Due to factual distinctions between the Augusta Project and the project at issue in this case, however, affirmance of the Maine Supreme Judicial Court's decision would not necessarily control the disposition of Augusta's case. Augusta submits this brief to advocate reversal of the decision below. Alternatively, if the Court affirms that decision, Augusta urges the Court to do so on a narrow ground that observes the distinction between Augusta's case and this one.

SUMMARY OF ARGUMENT

Under this Court's *Miccosukee* decision, a flow of water from one place to another is not a "discharge," within the meaning of the CWA, unless the source and the destination are "meaningfully distinct water bodies." If the two locations are "hydrologically indistinguishable parts of a single water body," then the flow of water from one part to another is not an "addition" to the navigable waters and hence it is not a "discharge." The waters of a river or stream, above and below a dam, are not "meaningfully distinct."

They are "hydrologically indistinguishable." The flow of water over or through a dam therefore is not a CWA "discharge" and state certification under Section 401 is not required.

Alternatively, if the Court affirms the decision below it should do so on the narrow ground articulated by the Maine Supreme Judicial Court and by the First Circuit's *Dubois* decision -- that water which is removed from its natural course, subjected to private control (*e.g.*, passed through a snowmaking machine), and then returned to the river below constitutes a "discharge" to the waters below the point of diversion. This case does not present the same factual situation as Augusta's case, which involves a low-lying diversion structure which acts passively to allow water to flow downstream, impelled by gravity and not affected by any sort of control mechanism. This Court should not render a decision that predetermines the result of cases such as Augusta's, without allowing interested parties the opportunity to provide full briefing and argument on an adequate record that properly presents those questions for decision.

ARGUMENT

I. The flow of water through a dam is not a "discharge" within the meaning of Section 401 of the Clean Water Act.

This case tests the implications of *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). *Miccosukee* dealt with the question whether a discharge permit, under the National

Pollutant Discharge Elimination System (NPDES) created by Section 402 of the CWA, 33 U.S.C. § 1342, was required for a pumping facility in the Florida Everglades that transfers water from a canal into a wetland impoundment. The Court held that the dispositive question was whether the canal and the wetland are "meaningfully distinct water bodies" or "two hydrologically indistinguishable parts of a single water body," and it remanded for further development of that factual question. *Miccosukee*, 541 U.S. at 112, 109. If they are not meaningfully distinct water bodies, then there is no discharge into the navigable waters and the pump station will not need an NPDES permit. *Id.* at 112.

Application of the *Miccosukee* precedent to the Warren Company (or Augusta Project) FERC license proceedings should be simple and straightforward. The only legal distinction between *Miccosukee* and this case is that *Miccosukee* arose under Section 402 and this case arose under Section 401 of the same federal Act. The issue in both cases is the meaning of the statutory term "discharge"; and "the normal rule of statutory interpretation [is] that identical words used in different parts of the same statute are generally presumed to have the same meaning." *IBP, Inc. v. Alvarez*, ___ U.S. ___, No. 03-1238, slip op. at 11 (Nov. 8, 2005). *See also, e.g., Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995), and cases cited therein.

The only substantive difference between Sections 401 and 402 is that the former applies to "any activity ... which may result in a discharge," while the latter is limited to activities that result in a "discharge

of a pollutant." In *Miccosukee*, however, there was no dispute that the water transferred from the canal into the wetland contained a pollutant (phosphorous). *See Miccosukee*, 541 U.S. at 102-03. The only issue was whether the transfer of polluted water from the canal into the wetland was a "discharge" within the meaning of the CWA.[2] The Court held that the answer to that question turned on whether the canal and the wetland are "meaningfully distinct water bodies" or "two hydrologically indistinguishable parts of a single water body." *Id.* at 112, 109.

The CWA does not define the term "discharge" but describes it as "includ[ing] a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16). It does define "discharge of a pollutant," as "any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12); *Miccosukee*, 541 U.S. at 102 (emphasis added). Thus "the word 'discharge' contemplates the addition ... of a substance or substances" to the "navigable waters"; and that is true under both Section 401 and Section 402. That is a specific holding of *State of North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1188 (1998).[3] *See also, e.g.*, U.S. Environmental

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[2] "The District does not dispute that phosphorous is a pollutant, or that [the canal] and [the wetland] are 'navigable waters' within the meaning of the Act. The question, it contends, is whether the operation of the S-9 pump constitutes the 'discharge of [a] pollutant' within the meaning of the Act."

[3] "Granted, the congressional instruction of 'discharge' in 33 U.S.C. § 1362(16) does not define discharge, but rather describes it as including 'discharge of a pollutant' which Congress has

(footnote continued ...)

Protection Agency, Office of General Counsel Opinion 78-8, at 2-4 (April 19, 1978)[4]; 58 Fed. Reg. 45008, 45011 (1993)[5]; *Virginia Electric and Power Company*, 77 FERC

(footnote continued:)

heretofore defined in § 1362(12) as 'meaning ... any *addition* of any pollutant ....' (emphasis added). It would seem to us apparent that since Congress meant 'discharge' to include 'discharge of a pollutant' then Congress intended the word 'discharge' to be defined in the inclusive use consistently with the included use. Therefore, if 'discharge of a pollutant' requires addition, then the inclusive understanding of 'discharge' also requires an addition." *North Carolina v. FERC*, 112 F.3d at 1187 n.4.

[4] "Section 401(a)(1) grants certification to the State 'in which the discharge originates or will originate.' Under Section 502(12) the discharge of the pollutant is defined as 'any addition of any pollutant to navigable waters from any point source.' Thus, there is no discharge until the pollutants enter navigable waters. For the purposes of Section 401, at least, the discharge thus originates at the point at which it enters the navigable waters."

[5] "EPA and the Corps agree ... that the presence of a 'discharge' into waters of the U.S. is an absolute prerequisite to an assertion of regulatory jurisdiction under Section 404 [of the CWA, 33 U.S.C. § 1344, which applies only when there is a 'discharge of dredged or fill material into the navigable waters'] .... [T]his has been the agencies' long-standing position, and we are not altering that view in this rulemaking. For the reasons explained in this preamble, the agencies believe that addition or redeposition of dredged material in the course of activities such as mechanized landclearing, ditching, channelization and other excavation meets the discharge requirement ...." *Cf. National Mining Ass'n v. United States Army Corps of Engineers*, 145 F.3d 1399, 1404 (D.C. Cir. 1998) (invalidating the specific regulation announced in the cited Federal Register notice, on the ground "that the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back").

¶ 61138 (1996), *aff'd, North Carolina v. FERC*, 112 F.3d 1175 (D.C. Cir. 1997) ("We believe that Congress intended the word 'discharge' to include only substances that are added to the water in some manner ..."). Even the court below agreed, in this case, that "[a]n 'addition' is the fundamental characteristic of any discharge." *S.D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27, ¶ 11, 868 A.2d 210, 215 (2005). That legal conclusion is virtually compelled by the definitional language of the CWA, and to the best of our knowledge it has never been disputed or questioned by any credible authority.

In *Miccosukee*, the Court noted with approval the Miccosukee Tribe's concession "that if [the canal] and [the wetland impoundment] are *simply two parts of the same water body*, pumping water from one into the other cannot constitute an 'addition' of pollutants." 541 U.S. at 109 (emphasis added). Continuing, the Court quoted from *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2d Cir. 2001), as follows: "'[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot.'" The dispositive question therefore was whether the canal and the wetland are "two pots of soup" or one. *Miccosukee*, 541 U.S. at 110.[6] That likewise is the dispositive question here.

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[6] *Cf. Catskill Mountains Chapter*, 273 F.3d at 493, discussing *Dubois v. United States Dep't of Agriculture*, 102 F.3d 1273 (1st Cir. 1996) ("The court held that the transfer of polluted water from one water body [a river] to a distinct water body [a pond upstream of the river] constitutes an 'addition' of pollutants to the destination

(footnote continued ...)

The Maine Supreme Judicial Court apparently was unwilling to follow the logical implications of the *Miccosukee* decision, however.[7] It held instead that the operation of the Warren Company's dams "does result in an addition to the waters of the Presumpscot River" because the dams "remove the water of the river from its natural course, exercise private control over the water and then *add* the water back into the river." 2005 ME 27, ¶¶ 12, 13, 868 A.2d at 215, 216 (emphasis in

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(footnote continued:)

water body. The court emphasized that the two bodies of water, for all relevant purposes, were distinct: although water naturally flowed from the pond into the river, water would never naturally flow from river to pond. "*That difference made the pumping an 'addition'*") (emphasis added).

[7] The FERC was similarly unwilling to follow *Miccosukee* in its decision in Augusta's case. It stated that Augusta's argument "reads too much into *Miccosukee*," because "that case involved the necessity for obtaining an NPDES permit under CWA section 402, which is not the case here." *City of Augusta, Georgia*, 109 FERC ¶ 61,210 at P 11. It also reasoned that "[w]ater passing through the project impoundment may be changed in temperature or in chemical composition. Also, the act of flowing over the dam may alter certain characteristics of the water, such as its dissolved oxygen content." *Id.*, P 12 (footnote omitted).

That analysis misses the point. A discharge is an addition, whether under Section 402 or Section 401. If there were a discharge, a finding of changes in temperature or chemical composition might lead to a conclusion that there is a discharge of pollutants; but that does not address the question whether there is a discharge, which is the only appropriate question under Section 401. In *Miccosukee* the presence of pollutants in the water transferred from the canal to the wetland impoundment was acknowledged by all parties and by the Court; but that fact did not affect the critical question, in that case as in this one, whether there was a discharge at all.

original). "[W]ater that has left its natural state and has been subjected to man-made control constitutes an 'addition' upon its return to the same navigable waterway.... Therefore, water that leaves the river and runs through the dam before returning to the river constitutes a discharge for the purposes of Section [401]." *Id.* at ¶ 17, 868 A.2d at 217.

The Maine Supreme Judicial Court erred. Application of its reasoning to the *Miccosukee* case would have led to a different result. *Miccosukee* turned on the hydrologic relationship between the canal and the wetland impoundment. As described in that decision, "a large pump station known as 'S-9'" pumps water out of the canal and into the wetland, sixty feet away. 541 U.S. at 100. The S-9 pump station undeniably subjects the water to "man-made control," in the words of the decision below in this case. "The District Court certainly was correct to characterize the flow through the S-9 pump station as a non-natural one, propelled as it is by diesel-fired motors against the pull of gravity." *Miccosukee*, 541 U.S. at 111. Under the Maine Supreme Judicial Court's reasoning, therefore, pumping the water from the canal into the wetland is a "discharge" as a matter of law. This Court did not see the matter that way, however. The dispositive issue to be addressed on the remand in *Miccosukee* had nothing to do with the pumping or "man-made control" of the water, but whether the canal and the wetland are "meaningfully distinct water bodies"; and if they are not, "then the S-9 pump station will not need an NPDES permit." *Id.* at 112.

The portions of a river above and below a dam which temporarily interrupts the river's flow are not "meaningfully distinct water bodies." *Id.* They are "two hydrologically indistinguishable parts of a single water body." *Id.* at 109. Water flowing over the dam therefore is not *added to* the "navigable waters" below the dam, and there is no "discharge *into* the navigable waters" below that dam. CWA § 401(a)(1) (emphasis added). The logic employed in *Miccosukee* compels the conclusion that Section 401 does not apply.

That is the case with the Augusta Diversion Dam. Water flows continuously downstream, over the dam, and it would continue to flow downstream if the dam were removed. There is no disputing the fact that the sections of the Savannah River above and below the dam are simply two parts of the same water body. Water flowing over the dam therefore is not added to the "navigable waters" below the Dam, there is no "discharge into the navigable waters," and Section 401 does not apply.

II. If the Court affirms the judgment below, it should do so on the narrow ground stated by the Maine Supreme Judicial Court

The Warren Company's hydroelectric dams, at issue in this case, include intake structures, powerhouses, and river bypasses that convey water from the project dams to the downstream end of their tailrace channels. *See S.D. Warren Co.*, 105 FERC ¶ 61,013 at P 10 (2003) (Saccarappa Project); *S.D. Warren Co.*, 105 FERC ¶ 61,012 at P 13 (2003) (Little Falls Project); *S.D. Warren Co.*, 105 FERC ¶ 61,011 at

P 14 (2003) (Mallison Falls Project); *S.D. Warren Co.*, 105 FERC ¶ 61,010 at P 13 (2003) (Gambo Project); *S.D. Warren Co.*, 105 FERC ¶ 61,009 at P 13 (2003) (Dundee Project).

As discussed above, the Maine Supreme Judicial Court held that the operations of those dams result in an addition to the waters of the Presumpscot River on the ground that "water that has left its natural state and has been subjected to man-made control constitutes an 'addition' upon its return to the same navigable waterway.... Therefore, water that leaves the river and runs through the dam before returning to the river constitutes a discharge for the purposes of Section [401]." 2005 ME 27, ¶ 17, 868 A.2d at 217. It relied in part on *Dubois v. United States Dep't of Agriculture*, 102 F.3d 1273, 1297 (1st Cir. 1996), which held that water passing through snowmaking pipes "leaves the domain of nature and is subject to private control rather than purely natural processes. As such, it has lost its status as waters of the United States."

That reasoning does not apply to Augusta's case. The Augusta Diversion Dam has no intake or powerhouse. It has no gates, flashboards, spillway or valves which release water into the River, and no operator triggers any such releases. It is a low-lying diversion structure with no significant impoundment, little more than a weir. It acts passively to allow water to flow downstream, impelled by gravity and not affected by any sort of control mechanism. Augusta's case thus does not present the question of application of Section 401 to a facility in which water is diverted

through a powerhouse and bypasses some portion of the stream.

The Augusta Canal headgates are located adjacent to the Augusta Diversion Dam and control the flow of water through the canal, which parallels an approximately seven-mile reach of the Savannah River. The reasoning of the *Dubois* decision and the decision below therefore might be applied to the water flowing from the Augusta Canal through the mill powerhouses, but not to the water that flows over the Augusta Diversion Dam. No part of the Augusta Canal is located in South Carolina. Application of the reasoning employed by *Dubois* and the Maine Supreme Judicial Court therefore would require Augusta to obtain a Section 401 certification from Georgia but not from South Carolina, contrary to the FERC's decision in its case.

If the Court determines to affirm the decision below, Augusta urges it to do so on the narrow ground stated in *Dubois* and the decision below. We respectfully submit that the Court should not announce a broadly worded decision that would lead the FERC and the lower courts to conclude that *all* water that flows over or through a dam *necessarily* constitutes a "discharge" within the meaning of the CWA. Questions arising from cases such as Augusta's are not presented in this case, and therefore the Court should be careful not to predetermine the result of such cases without allowing interested parties the opportunity to provide full briefing and argument, on an adequate record that properly presents those questions for decision.

CONCLUSION

For the foregoing reasons, the decision of the Maine Supreme Judicial Court should be reversed or, in the alternative, affirmed on the narrow grounds stated in that decision.

Respectfully submitted,

AUGUSTA, GEORGIA

George A. Somerville (Counsel of Record)
Troutman Sanders LLP
P.O. Box 1122
Richmond, Virginia 23218-1122
(804) 697-1200 (Phone)
(804) 698-5149 (Fax)
George.Somerville@troutmansanders.com

James B. Wall
Burnside Wall LLP
P.O. Box 2125
Augusta, Georgia 30903
(706) 722-0768 (Phone)
(706) 722-5984 (Fax)
jbwall@burnsidewall.com

No. 04-1527

NOV 2 5 2005

In The
Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Writ Of Certiorari To The Maine Supreme Judicial Court

BRIEF FOR *AMICI CURIAE* EDISON ELECTRIC INSTITUTE, THE AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN PUBLIC POWER ASSOCIATION, THE NATIONAL HYDROPOWER ASSOCIATION, AND THE UTILITY WATER ACT GROUP IN SUPPORT OF PETITIONER

JEFFREY L. FISHER
(*Counsel of Record*)
DANIEL M. ADAMSON
DAVIS WRIGHT TREMAINE LLP
1500 K Street N.W., Suite 450
Washington, D.C. 20005
(202) 508-6600
Counsel for Amici Curiae

HENRI D. BARTHOLOMOT
EDWARD H. COMER
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2696

(Of Counsel Listing On Inside Cover)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

KRISTY A.N. BULLEIT
HUNTON & WILLIAMS LLP
1900 K Street, N.W., Suite 1200
Washington, D.C. 20006
Counsel for Utility Water Act Group

JAMES H. HANCOCK JR.
BALCH & BINGHAM LLP
1710 Sixth Avenue North
Birmingham, AL 35203
Counsel for National Hydropower Association

JEFFREY A. LEAHEY
NATIONAL HYDROPOWER ASSOCIATION
1 Massachusetts Avenue, N.W., Suite 850
Washington, D.C. 20001

JERRY SCHWARTZ
RICHARD S. WASSERSTROM
AMERICAN FOREST & PAPER ASSOCIATION
1111 Nineteenth Street, N.W., Suite 800
Washington, D.C. 20036

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. It Is Vitally Important To The Nation's Hydropower Resources That The Reach Of Section 401 Be Appropriately Circumscribed	6
A. Hydropower Projects Are Important Components Of The Nation's Energy Supply And Provide Numerous Other Benefits	6
B. FERC's Licensing Authority Requires It Comprehensively To Balance The Public Benefits Of Non-Federal Hydropower Projects	7
C. In Recent Years, States Increasingly Have Applied Section 401 In An Expansive Manner, Eroding FERC's Ability To Strike The Proper Balance Between Energy And Environmental Values	9
D. As A Result Of States' Expansive Use Of Section 401, Hydropower Project Benefits Have Diminished And Licensing Costs Have Risen	12
E. Section 401 Has Expanded Into FERC's Licensing Process Without Guidance From This Court As To Whether And, If So, When Existing Hydropower Projects Issue "Discharges."	15

TABLE OF CONTENTS – Continued

Page

II. The Mere Flow Of Water Through An Existing Hydroelecric Project Is Not A Discharge Under Section 401 Of The Clean Water Act 16

A. A Discharge Requires The Addition Of A Substance Or Substances External To The Navigable Waters 17

B. The Mere Flow Of Water Through A Hydropower Project Does Not Involve An Addition To The Navigable Waters 20

III. The State Court's "Ownership" Or "Control" Test Finds No Support In Law Or Logic 23

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES:

Alden v. Maine, 527 U.S. 706 (1999) 15

American Rivers, Inc. v. FERC, 129 F.3d 99 (2d Cir. 1997) 10, 12

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 488 (2d Cir. 2001) 19

Conservation Law Found. v. FERC, 216 F.3d 41 (D.C. Cir. 2000) 9

First Iowa Hydro-Elec. Coop. v. FPC, 328 U.S. 152 (1946) 8

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 23

Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 17

Mobil Oil Corp. v. Kelley, 426 F. Supp. 230 (S.D. Ala. 1976) 14

National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988) 22

National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 21

North Carolina v. FERC, 112 F.3d 1175 (D.C. Cir. 1997) 16, 18, 20, 21

PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994) 9, 11, 15, 16

South Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95 (2004) ..... *passim*

United States Dep't of the Interior v. FERC, 952 F.2d 538 (D.C. Cir. 1992) 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

16 U.S.C. § 791(a) *et seq.* 6
16 U.S.C. § 797(e) 8
16 U.S.C. § 803 8
16 U.S.C. § 803(a) 14
16 U.S.C. § 803(j) 14
16 U.S.C. § 808 8
16 U.S.C. § 825l 15
16 U.S.C. §§ 1451-65 9
16 U.S.C. §§ 1531-44 9
33 U.S.C. § 1314(f)(F) 20
33 U.S.C. § 1341 6
33 U.S.C. § 1341(a)(1) 17
33 U.S.C. § 1341(d) 10
33 U.S.C. § 1342 ..... 18, 19
33 U.S.C. § 1344 19
33 U.S.C. § 1362(11) 18
33 U.S.C. § 1362(12) 18
42 U.S.C. § 4334 15
42 U.S.C. §§ 4321-47 9

REGULATIONS:

18 C.F.R. § 385.214 15
WASH. ADMIN. CODE § 197-11-440 (2005) 10

TABLE OF AUTHORITIES – Continued

Page

ADMINISTRATIVE DECISIONS:

Consumers Power Co., 74 FERC ¶ 61,055 (1996) 22

Puget Sound Energy, Inc., 107 FERC ¶ 61,331 (2004) 14

S.D. Warren Co., 105 FERC ¶ 61,013 (2003) 11

OTHER AUTHORITIES:

Clean Water Amendments of 1995, H.R. 961, 104th Cong. (1995) 17

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H.R. Rep. No. 104-112, at 83 (1995) 17

TABLF OF AUTHORITIES – Continued

Page

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Vermont Water Quality Standards, §§ 3-02-3-04 (2000), *available at* http://www.state.vt.us/wtrboard/july2000wqs.htm 10

INTEREST OF *AMICI*

Amici (hereafter, the "Hydropower *Amici*") represent hydropower project owners and operators from across the Nation, as well as others who rely on such projects, all of whom will be directly affected by this Court's decision in this case.[1] In particular:

The Edison Electric Institute ("EEI") is the trade association of United States shareholder-owned electric utility companies, international affiliates, and industry associates worldwide. Its U.S. members serve 71 percent of all electric utility customers in the Nation and generate almost 60 percent of the electricity produced by U.S. generators. In providing these services, many EEI members rely on hydropower, and many own and operate hydropower projects licensed by the Commission. In fact, EEI members comprise the largest group of Federal Energy Regulatory Commission ("FERC" or "Commission") hydropower project license holders.

The American Forest & Paper Association ("AF&PA") is the national trade association of the forest, paper, and wood products industry. AF&PA represents more than 200 companies and related associations that engage in or represent the manufacture of pulp, paper, paperboard and wood products. The forest products industry accounts for approximately seven percent of total U.S. manufacturing output, employs 1.1 million people, and ranks among the top ten manufacturing employers in 42 states. AF&PA

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, the Hydropower *Amici* state that no counsel for any party authored any part of this brief, and no person or entity, other than *Amici*, their members, and their counsel made a monetary contribution to this brief.

member companies represent approximately 84 percent of the domestic paper, paperboard and market pulp production capacity, and they account for more than half of the solid wood manufacturing capacity. They own a significant portion of the nation's commercial forests and annually plant nearly half of all tree seedlings in the U.S. A significant number of AF&PA member company facilities own and operate hydroelectric dams, which power manufacturing operations at those facilities, making them largely energy-self sufficient.

The American Public Power Association ("APPA") is the trade association representing the interests of approximately 2,000 municipal and other state and local community-owned utilities throughout the United States. APPA member utilities include state public power agencies, and serve many of the Nation's largest cities. But the majority of its members are located in small and medium-sized communities in 49 states – all but Hawaii. Public power utilities serve over 14 percent of all electric utility customers in the nation. Over 21 percent of public power's total generating capacity is from hydropower, the largest percentage based on capacity of all of the utility sectors.

The National Hydropower Association ("NHA") is a non-profit national association dedicated exclusively to advancing the interests of the U.S. hydropower industry. NHA represents 61 percent of domestic, non-federal hydroelectric capacity and nearly 80,000 megawatts overall in North America. Its membership consists of more than 140 organizations including public utilities, investor-owned utilities, independent power producers, equipment manufacturers, environmental and engineering consultants, and attorneys.

The Utility Water Act Group ("UWAG") an unincorporated association of 205 individual electi companies and four national trade associations repre nting the power industry. The individual companies perate a variety of electric generating pl nts, includi ng FERC-licensed hydroelectric fa ilities, and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers.

The members of the Hydropower *Amici* operate and rely on hydropower projects that FERC has licensed for energy and other benefits. The Hydropower *Amici* are concerned that in recent years, state water quality agencies increasingly have applied section 401 of the Clean Water Act ("CWA") so expansively that the state agencies are impeding hydropower projects' abilities to provide these benefits. It thus is essential that this Court make clear that the mere flow of water through an existing hydroelectric dam does not trigger section 401 of the CWA.

SUMMARY OF ARGUMENT

Hydropower projects licensed by FERC play a vital role in our Nation's energy economy and provide numerous other benefits on which the Hydropower *Amici*, their customers, and communities across the country rely. The United States derives approximately ten percent of its electricity from hydropower projects, including projects licensed by FERC. Hydropower is our Nation's largest source of renewable energy. Hydropower projects are critical to maintaining electric system reliability because of their ability to adjust quickly to changing grid conditions and their energy storage capability. The projects also

provide numerous other benefits, such as drinking and irrigation water, fish and wildlife habitat, navigation, flood control, and recreation.

Hydropower projects are extensively regulated to ensure that their operations are environmentally sound, and project owners recognize that they play an important role as stewards of the resources involved. Part I of the Federal Power Act ("FPA") charges FERC with responsibility for licensing non-federally owned hydropower projects. FERC must apply a host of statutory requirements, not only under the FPA but also under numerous other environmental and resource laws. In doing so, FERC strives to ensure that the projects produce multiple benefits and serve the overall public interest.

In recent years, however, state water quality agencies – agencies with statutory mandates different from FERC's – increasingly have used section 401 of the Clean Water Act to take control over the hydropower project licensing process. The water quality agencies often impose expansive license conditions, thereby limiting FERC's ability to manage the licensing process and impeding project benefits. Accordingly, this Court should give careful consideration to the applicability of section 401 in the hydropower licensing context. Hydropower projects should not be subject to unnecessary and duplicative regulation, particularly when not statutorily authorized.

The Maine Supreme Judicial Court in this case interpreted section 401 too broadly. Although the state court correctly construed the phrase "any discharge into" in section 401 to require an "addition" to the navigable waters before a state certification is required, the court erred in concluding that the mere flow of water through a

hydropower project creates an "addition" by temporarily changing the "control" or "ownership" of the water. The language and structure of the Clean Water Act, as well as this Court's decision in *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 106 (2004), dictate that the mere temporary control or ownership of water is not enough to "add" something to the navigable waters. An "addition" must introduce *something new* into navigable water. Simply moving water from one part of a water body to another, *Miccosukee* made clear, does not add anything new to the water.

Construing section 401 this way does not, as the state court erroneously believed, risk equating its scope with section 402, which is triggered only when a water project "discharges a pollutant." Section 401, properly construed, may still apply in instances when section 402 does not – namely, when a water project adds a substance to the water that is not a pollutant. But both statutory sections require as a precondition that *something* be added. The mere flow of water through a hydropower project simply does not cause any discharge to begin with.

ARGUMENT

The statutory interpretation question that this case presents does not arise in a vacuum, but rather in the context of a complex regulatory regime that has real, tangible consequences for those involved in the hydropower industry, and the communities and consumers who rely on hydropower projects. Accordingly, we first describe that regulatory regime and highlight why maintaining reasonable limits on the applicability of section 401 is so

important. We then turn directly to explain why statutory text and this Court's precedent dictate that section 401 does not apply to the mere flow of water through existing hydropower projects.

I. It Is Vitally Important To The Nation's Hydropower Resources That The Reach Of Section 401 Be Appropriately Circumscribed.

This case presents an issue of substantial importance to our industry and to the Nation: the operation of the federal regulatory regime applicable to existing, non-federally owned hydroelectric projects. Hydropower projects provide clean, renewable sources of energy and multiple other public benefits. But in recent years, state water quality agencies have increasingly applied section 401 of the Federal Water Pollution Control Act, 33 U.S.C. § 1341 expansively to existing hydropower projects that do not add any new substance to water bodies. Such expansive assertions of state authority intrude heavily into FERC's ability to use the federal licensing process under Part I of the FPA, 16 U.S.C. § 791a *et seq.*, to maximize the overall benefits of such projects. In addition, inappropriately applying section 401 to such projects imposes significant extra burdens on the owners of hydropower projects, the communities who depend on the projects, and others involved in the licensing process.

A. Hydropower Projects Are Important Components Of The Nation's Energy Supply And Provide Numerous Other Benefits.

Hydropower projects are critical components of the Nation's energy supply. Hydropower is a clean, domestic

energy source and our Nation's single largest renewable energy source.[2] Currently, such projects provide about ten percent of the nation's electricity.[3]

Yet hydropower projects do more than simply generate electricity. The projects help maintain the national electric system's stability; speed recovery when the electric grid is disrupted; and provide valuable base load and peaking power, thereby avoiding the need for additional power plants that rely on increasingly limited natural gas and oil supplies and other fuels. Hydropower projects also provide energy to manufacturing facilities that own and operate such projects, helping to keep our country's manufacturing base competitive in world markets. In addition to these energy-related benefits, hydropower projects provide numerous other public benefits, including improved air quality, flood control, navigation, irrigation and drinking water, fish and wildlife habitat, and recreational opportunities.

B. FERC's Licensing Authority Requires It Comprehensively To Balance The Public Benefits Of Non-Federal Hydropower Projects.

Part I of the FPA gives FERC broad licensing authority over most non-federal hydropower projects and charges FERC with ensuring that the projects can provide these benefits while fully addressing environmental issues. FPA

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[2] *See* Energy Information Administration, *Annual Energy Review 2004*, at 318, *available at* http://www.eia.doe.gov/emeu/aer/pdf/aer.pdf.

[3] *See* Energy Information Administration, *Existing Capacity by Energy Source 2003*, *available at* http://www.eia.doe.gov/cneaf/electricity/epa/epaxlfile2_2.xls.

section 4(e) requires FERC to give equal consideration to a host of energy, environmental, and other factors, and requires FERC to craft licenses that enable projects to provide energy and many other benefits in the public interest. 16 U.S.C. § 797(e); *see also First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 167-68 (1946) (recognizing the FPA comprehensive licensing authority and federal preemption of state licensing authority).[4]

In addition, section 10 of the FPA requires the Commission to consider the recommendations of a variety of federal and state agencies with respect to a broad spectrum of issues related to a hydroelectric project, including flood control, irrigation, water supply, recreation, and other beneficial public uses, and to ensure that the project is best adapted to a comprehensive plan for improving the waterway. *See* 16 U.S.C. § 803. In issuing new licenses for existing projects pursuant to section 15 of the FPA, the Commission also must consider additional factors to ensure that the new license is best adapted to serve the public interest, including both: (1) the applicant's plans to operate and maintain the project in a manner most likely to provide efficient and reliable service; and (2) the applicant's need for the electricity generated by the project to serve its customers. *See* 16 U.S.C. § 808.

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[4] 16 U.S.C. § 797(e) provides: "In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damages to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality."

This comprehensive FERC licensing process, in combination with other applicable environmental laws such as the Endangered Species Act, 16 U.S.C. §§ 1531-44, National Environmental Policy Act, 42 U.S.C. §§ 4321-47, and Coastal Zone Management Act, 16 U.S.C. §§ 1451-65, ensures that environmental issues are fully addressed. Furthermore, the licensing process invites robust participation by state agencies and all other persons interested in deriving benefits from the projects. FERC requires license applicants to consult extensively with such agencies, and FERC itself ensures that their views are fully addressed in the ultimate licenses it issues. At the same time, "[w]hile the Commission must give 'equal consideration' to environmental factors, those factors do not have 'preemptive force.' The Commission 'still is charged with determi[n]ing the "public interest," *i.e.*, balancing power and non-power val[u]es.'" *Conservation Law Found. v. FERC*, 216 F.3d 41, 45 (D.C. Cir. 2000) (citation omitted).

C. In Recent Years, States Increasingly Have Applied Section 401 In An Expansive Manner, Eroding FERC's Ability To Strike The Proper Balance Between Energy And Environmental Values.

While the FPA requires FERC to balance energy and environmental values when licensing hydropower projects, states that invoke their authority under section 401 to review such projects do not operate under any such explicit statutory mandate. Accordingly, in the aftermath of this Court's decision in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994) – which upheld conditions that a state agency sought to impose under section 401 with respect to proposed construction

and operation of a *new* hydropower project where a discharge was assumed to exist – state water quality agencies have begun setting license conditions for *existing* hydropower projects under section 401 without taking into account the impacts on power or other developmental values. In many states, the section 401 process has evolved from a focused review of compliance with state water quality standards to a much more expansive parallel state licensing or permitting scheme.

Many section 401 certifications now include conditions that touch on virtually every aspect of hydropower licensing and project operations, including water flows, water levels, fish passage, fish habitat, and recreational facilities and access, as well as provisions that purport to reserve authority to reopen the certification at any time in order to require additional measures. Some states have even gone so far as to require "aesthetic" flows of water as part of a section 401 certification.[5] Furthermore, in addition to applying water quality standards under section 401, state agencies assert authority under the "other appropriate requirement" language in subsection 401(d) to impose an even broader range of procedural and substantive requirements under other state law. 33 U.S.C. § 1341(d).[6] *See also American Rivers, Inc. v. FERC*, 129 F.3d 99, 107-08 (2d Cir. 1997) (holding that state agencies need not

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[5] *See, e.g.*, Vermont Water Quality Standards, §§ 3-02 – 3-04 (2000), *available at* http://www.state.vt.us/wtrboard/july2000wqs.htm.

[6] For example, the Washington State Department of Ecology requires compliance with the state's environmental policy act in connection with a section 401 certification. That act includes additional procedural and substantive requirements to "mitigate" impacts to an extensive array of "elements of the environment." WASH. ADMIN. CODE § 197-11-440 (2005).

demonstrate to FERC that 401 conditions are within a state's authority or reasonably related to water quality).

The S.D. Warren section 401 certification is typical in this respect. It contains a host of conditions relating to water levels and flows, impoundment drawdowns and refill procedures, eel and fish passage, recreation measures, and recreational facilities as well as "reopeners" that purport to permit the state to impose additional or different requirements in the future. *S.D. Warren Co.*, 105 FERC ¶ 61,013 at 61,152 (2003).

Such conditions not only prevent FERC from crafting reasonable, balanced licenses for existing projects being licensed, but they also can directly constrain projects from producing the level of energy and other public benefits that the projects otherwise could provide. The federal courts of appeals, in the absence of guidance from this Court, have interpreted conditions that state water quality agencies impose under section 401 as mandatory conditions that FERC must include in new licenses. *See, e.g.*, *United States Dep't of the Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) ("FERC may not alter or reject conditions imposed by the states through section 401 certificates.").[7] These courts of appeals have barred FERC from deleting or modifying any conditions included in a state 401 certification, even if the conditions are completely

[7] Hydropower *Amici* believe that these decisions fail to give appropriate consideration to FERC's comprehensive authority over hydropower project licensing, but FERC is following them absent contrary guidance from this Court. *See Jefferson County*, 511 U.S. at 722 (leaving open the question whether FERC may override state-imposed conditions that conflict with FERC's own assessments concerning what is in public interest).

unrelated to any adverse impact of an existing project on water quality. *American Rivers*, 129 F.3d at 107-10.

D. As A Result Of States' Expansive Use Of Section 401, Hydropower Project Benefits Have Diminished And Licensing Costs Have Risen.

As a result of state agencies' increasingly expansive use of section 401, FERC has been less able in recent years to ensure that existing hydropower projects can produce the full range of energy and other benefits the projects otherwise would provide. The projects have not been able to produce as much electricity when needed as they otherwise could have produced. Also, the projects' loss of operational flexibility has diminished their ability to maintain electric grid reliability and to provide other valuable benefits. Simply put, project owners and the public have been less able to rely on the projects for energy and other benefits when most needed.

Also, in part because of the need to accommodate parallel state water quality agency proceedings under section 401, FERC licensing process has grown dramatically more complex, costly, and time consuming. The licensing process itself – not including the cost of complying with any of the new requirements agencies impose on the licensees – often costs millions of dollars. In some recent cases, the process has cost tens of millions of dollars.[8]

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[8] FERC, *Report On Hydroelectric Licensing Policies, Procedures, & Regulations, Comprehensive Review & Recommendations Pursuant to Section 603 of the Energy Act of 2000* (May 2001), at 47-48, *available at*,

(Continued on following page)

Moreover, the licensing process now typically takes between five and ten years, and sometimes longer, which delays the implementation of new license conditions aimed at providing energy, environmental, and other benefits, including water quality improvements. According to a FERC staff report to Congress, the primary reason for delay in the issuance of hydroelectric licenses – the vast majority of which are for existing projects whose licenses are being renewed – has been state water quality agencies' inability to issue 401 certifications on a timely basis.[9] Although section 401 requires state agencies to act on a request for certification within one year, it has become a common practice for such agencies to request that licensees repeatedly withdraw and re-file such applications, thereby "restarting" the one-year clock. In one case, a state imposed such a request thirteen times.[10] If an applicant

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http://www.ferc.gov/legal/maj-ord-reg/land-docs/ortc_final.pdf. *See also* Idaho Power Co., Hells Canyon Complex, FERC No. 1971, License Application (July 2003), at Executive Summary vii – viii ("[T]he Applicant initiated and completed more than 100 relicensing studies and reports a cost to date of approximately $45 million."), *available at* http://www.ferc.gov/docs-filing/elibrary.

[9] *Report On Hydroelectric Licensing Policies, Procedures, & Regulations*, *supra* note 8, at 40. According to the report, the "primary reason for delay was lack of water quality certification." *Id.* This trend continues to the present. At the Hydropower Licensing Status Workshop that FERC conducted on December 9, 2004, regarding long-delayed license applications, FERC concluded that of the 22 delayed projects reviewed, 12 were delayed in part due to lack of water quality certification. "[T]here are many reasons for delays sometimes in these licensing proceedings. And that, in many cases, maybe in most cases, it's the result of state decisions under water quality certifications." Transcript of Hydropower Licensing Status Workshop 2004, at 35, Docket No. AD04-014-000 (Dec. 9, 2004) (comments of Commissioner Kelliher).

[10] *See* Gulf Island – Deer Rips Project, Docket No. 2283, *available at* http://elibrary.ferc.gov/idmws/docketsearch.asp. Similarly, the license

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does not comply with such a request to re-file, it risks the state agency denying certification. Furthermore, even after a state agency issues a section 401 certification, affected parties sometimes file appeals, which take additional time. *See, e.g., Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 234-36 (S.D. Ala. 1976) (state courts, not federal courts, are proper venue for challenging state issuance of section 401 certification).

All of this is unnecessary because states already have ample opportunities to participate in the FERC licensing process. Wholly apart from invoking section 401, states have multiple opportunities to participate actively in the FERC licensing process. The licensing process involves years of consultation with federal and state agencies and the public aimed at ensuring all concerns are raised and addressed. Indeed, notwithstanding FERC's comprehensive licensing authority, the FPA requires FERC to adopt recommendations from state fish and wildlife agencies regarding the "protection, mitigation and enhancement" of fish and wildlife "affected by" a project, unless the Commission finds that such recommendations are inconsistent with other requirements in the FPA. 16 U.S.C. § 803(j). In addition, FERC must consider the extent to which licensing a hydropower project is consistent with a state's comprehensive plan for any waterway that the project may affect. 16 U.S.C. § 803(a). Finally, states have the ability to influence the outcome of licensing proceedings by participating in the environmental review process pursuant to

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applicant for the Snoqualmie Falls Hydroelectric Project, FERC Project No. 2493, "withdrew and refiled its certification application each year from 1992 through 2003." *Puget Sound Energy, Inc.*, 107 FERC ¶ 61,331 at 62,542 n. 20 (2004).

the National Environmental Policy Act. 42 U.S.C. § 4334. States can also intervene in FERC hydroelectric license proceedings, 18 C.F.R. § 385.214, giving them the right to request rehearing and, subsequently, to request judicial review in the federal courts of appeals. 16 U.S.C. § 8251.

E. Section 401 Has Expanded Into FERC's Licensing Process Without Guidance From This Court As To Whether And, If So, When Existing Hydropower Projects Issue "Discharges."

The explosion of section 401 regulation in the context of hydroelectric licensing has occurred in the absence of any guidance from this Court concerning whether and, if so, when existing hydroelectric projects issue "discharges" that trigger the requirement for a section 401 certification. In *Jefferson County*, this Court considered section 401 in the context of the issuance of an initial license for a proposed new hydroelectric project, not the relicensing of an existing project such as the S.D. Warren project. In that earlier case, the dam builder "concede[d]" that the project would result in a "discharge" in part because it would "release . . . dredged and fill material during the construction of the project." *Jefferson County*, 511 U.S. at 711.[11]

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[11] The dam builder also conceded that the water that the dam ultimately would release at the end of its trailrace could "possib[ly]" constitute a discharge. 511 U.S. at 711. Even if this concession could be interpreted to concede that such water would *actually* constitute a discharge, it would have been immaterial in that case because the release of dredged and fill material already rendered section 401 applicable. Furthermore, uncontested legal assumptions in prior decisions do not in any way foreclose this Court from examining and rejecting those assumptions in later cases. *See, e.g., Alden v. Maine*, 527 U.S. 706, 737 (1999).

Accordingly, this Court limited itself to addressing the proper scope of state section 401 authority over the construction of a proposed project "once the threshold condition, the existence of a discharge, is satisfied." *Id.* at 712; *see also North Carolina v. FERC*, 112 F.3d 1175, 1188 (D.C. Cir. 1997) (observing that this Court in *Jefferson County* "never attempted to define a discharge").

Therefore, this case presents the Court with an open issue of whether the mere flow of water through an existing hydroelectric project involves a "discharge" necessary to trigger section 401 certification requirements.

II. The Mere Flow Of Water Through An Existing Hydroelectric Project Is Not A Discharge Under Section 401 Of The Clean Water Act.

The question before the Court is whether the mere passage of water through an existing hydropower project being licensed by FERC involves a "discharge" into navigable waters such that a state water quality certification is required under section 401. The state court in this case correctly construed section 401 to require an "addition" to the navigable waters before a state certification is required. However, the state court erred in concluding that the mere flow of water through a hydropower project creates an "addition" because it temporarily changes the "control" or "ownership" of the water. *S.D. Warren Co. v. Board of Envt'l Protection*, 868 A.2d 210, 215-16 (Me. 2005). The language and structure of the Clean Water Act, together with this Court's decision in *Miccosukee*, 541 U.S. at 106, dictate that a "discharge" must involve an addition of *something new* to navigable water. Simply transferring water from one part of a water body to another, as *Miccosukee* made clear, does not add anything new to the water.

Accordingly, Hydropower *Amici* submit that the mere passage of water through a hydropower project does not involve any "discharge" into water that would trigger the need for a section 401 certification.

A. Discharge Requires The Addition Of A Substance Or Substances External To The Navigable Waters.

Section 401 applies only where a federally licensed activity "may result in any *discharge into* the navigable waters." 33 U.S.C. § 1341(a)(1) (emphasis added). The use of the term "discharge" – especially accompanied by the preposition "into" – suggests that the section applies only when an activity outside the water body adds something new into the water body. Had Congress intended section 401 to cover transfers of water within a single body of water, it would have used more encompassing terms, as it has in considering amendments to other sections of the CWA.[12] But it did not do so.

Other sections of the Clean Water Act confirm that "discharge" means addition of something new. It is a cardinal rule of statutory construction that the same word in different sections of an integrated statutory scheme should have the same meaning. *See, e.g., Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 397 (1978). The term "discharge" appears several times in the Clean

[12] For instance, in 1995, the House of Representatives passed the Clean Water Act Amendments of 1995, H.R. 961, 104th Cong. (1995), which contained comprehensive proposed amendments to the Clean Water Act. In section 803(m)(11)(A) of the bill, the House proposed to expand coverage of section 404 of the act from the current "discharge of dredged or fill material" to a more expansive "activity in wetlands or water of the United States." H.R. Rep. No. 104-112, at 83 (1995).

Water Act, and it consistently means an "addition." For example, Clean Water Act section 502(11) defines the term "discharge" as including "*discharge* of a pollutant" and "*discharge* of pollutants," which section 502(12) defines as meaning "any *addition* of any pollutant." 33 U.S.C. §§ 1362(11) & (12) (emphasis added). The definitions of "discharge of a pollutant" and "discharge of pollutants" thus squarely equate the word "discharge" with an "addition," leaving what constitutes a "pollutant" as an entirely separate question. The D.C. Circuit has observed that this equation of the term "discharge" with "addition" is "the nearest evidence of the definitional intent of Congress" with respect to the meaning of "discharge" in section 401. *North Carolina*, 112 F.3d at 1187.

Similarly, section 402 of the Clean Water Act, 33 U.S.C. § 1342, requires a National Pollutant Discharge Elimination System permit for activities that involve a "discharge of pollutants." While section 401 may be broader than section 402 in that the former applies when there is an "addition" of something, whereas the latter applies only when a "pollutant" is discharged, both sections – which sit side-by-side in the Clean Water Act – require, as a threshold condition, that some kind of "discharge" take place.

In this Court's recent *Miccosukee* decision, this Court squarely held that the word "discharge" in section 402 means the "addition" of something new. 541 U.S. at 102. *Miccosukee* concerned the question of whether a section 402 permit was required for a pump station that transferred water from a canal over a dike into a wetland area a short distance away. There was no dispute that the water that the pump station conveyed contained "pollutants" (in that case, phosphorus) as that term is defined by the CWA.

Id. Consequently, the sole issue was whether transferring water by the pumps from the canal into the wetland constituted a "discharge." *Id.* at 103.

This Court concluded that a "discharge" exists only when the water project at issue causes an "addition" to navigable water. *Id.* at 109. Even more important, this Court clarified that, when dealing with the mere transfer of water, an "addition" of "pollutants" from one water body to another occurs only when the place where the water is taken and the place where it is deposited are "meaningfully distinct water bodies." *Id.* at 112. The Court arrived at this conclusion because simply passing water from one part of a water body to another part does not "add" anything to the water body. As the Court further explained: "'[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot.'" *Id.* at 110 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 488, 492 (2d Cir. 2001)).

Finally, section 404 of the Clean Water Act, which concerns "discharge[s] of dredged or fill material," 33 U.S.C. § 1344, is triggered only when "dredged or fill material," which the Clean Water Act treats as a "pollutant," is added to the navigable waters. *Compare* 33 U.S.C. § 1344 (requiring permits for discharge of dredged or fill material) *with* 33 U.S.C. § 1342 (requiring permits for discharge of pollutants). While section 401 does not require the added substance to be dredged or fill material, it does require a "discharge," once again signifying that at least some external substance must be added to the water.

B. The Mere Flow Of Water Through A Hydropower Project Does Not Involve An Addition To The Navigable Waters.

Pursuant to the plain language of the CWA and this Court's decision in *Miccosukee*, the mere movement of water within a water body does not constitute an "addition" and, therefore, does not constitute a "discharge" under section 401.

This is precisely what occurs with respect to existing hydropower projects, such as the one at issue in this case, which pass water through the project works without adding anything to the water. In this case, the Presumpscot River flows through the projects without adding anything to the river. The river segments above and below the projects are the same body of navigable water. Therefore, under the reasoning of *Miccosukee*, no "addition" – and thus no "discharge into" the river – occurs.[13]

The D.C. Circuit's decision in *North Carolina v. FERC*, 112 F.3d 1175 (D.C. Cir. 1997), illustrates the soundness of this analysis. In that case, the court of appeals held that a hydropower project owner did not need to obtain a section 401 certification from the State of North Carolina in order to allow withdrawal of water from the project reservoir because the intake structure designed to remove the water would not cause any "discharge." *Id.* at 1188. According to the court of appeals, the intake

[13] Section 304(f) of the Act identifies structures such as dams that alter the flow of water as being non-point sources to be addressed through state-based non-point source programs (which are addressed under section 319 of the Act), lending further credence to the conclusion that the mere flow of water through hydropower projects does not involve a discharge under section 401. 33 U.S.C. § 1314(f)(F).

would only withdraw water and would not add anything to the project reservoir or the dam below it. *Id.* The court of appeals concluded that "the word 'discharge' contemplates the addition, not the withdrawal, of a substance or substances," so the withdrawal of water would not result in a "discharge" for the purposes of section 401. *Id.* at 1187. This reasoning is accurate and sensible, and it warrants emulation here.

Similarly, in well-settled law, the United States Environmental Protection Agency ("EPA") and the federal courts of appeals have determined that CWA section 402 does not apply to hydropower projects licensed by FERC absent an addition of external pollutants because the projects do not involve a "discharge" of pollu ants. In *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), the D.C. Circuit determined that section 402 does not apply to hydropower projects absent the addition of a pollutant.[14] The key issue was whether certain dam-induced water quality changes, which the plaintiff argued constituted pollutants, should be considered "discharges" from the dam. *Id.* at 161. The court of appeals upheld EPA's view that dam-induced water quality changes did not amount to discharges because such "changes are to water *conditions*, not substances *added* to the water." *Id* at 171 (emphasis added). In other words, the D.C. Circuit explained that nothing is discharged into water unless something is added "from the outside world." *Id.* at 175.

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[14] Even in a case where such a pollutant is added, the section 402 permit is limited to addressing the discharge of that pollutant, not a more expansive set of conditions of the sort states are imposing under section 401.

Consistent with *Gorsuch*, the Sixth Circuit subsequently held that the operation of a FERC-licensed pumped storage hydropower project on Lake Michigan did not involve a "discharge" triggering the application of section 402.[15] In *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), the court of appeals, just like this Court in *Miccosukee*, took it as a given that the substance that the water project was releasing into the water – there, dead fish and fish remains – were "pollutants within the meaning of the CWA." *Id.* at 583. But the Sixth Circuit held that the dam's release of the fish and remains did not constitute a discharge because it did not "add" anything to Lake Michigan "from the outside world." *Id.* at 584.[16]

If dams do not "discharge" anything as that term is used in section 402 of the Clean Water Act, it is inescapable that they do not "discharge" anything as that identical term is used in section 401. However broader section 401 may be in terms of the types of discharged substances that trigger its provisions, it cannot be any broader in terms of the requirement of a "discharge" itself.

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[15] A pumped storage project is a hydropower project where water is pumped from a lower reservoir to an upper one, where the water is stored until needed to produce electricity.

[16] The court of appeals further noted that its decision did not mean that the problem of the entrainment of fish by the pumped storage facility "will go unnoticed and unaddressed" because three separate articles of the FERC license for the project directly addressed the facility's impact on the fishery resources. *Id.* at 590. Indeed, a permanent fish barrier was ultimately installed pursuant to a settlement of fishery issues that was approved by the Commission. *Consumers Power Co.*, 74 FERC ¶ 61,055 (1996).

III. The State Court's "Ownership" Or "Control" Test Finds No Support In Law Or Logic.

Even though the Maine Supreme Judicial Court acknowledged that something must be added to water in order to trigger section 401, it determined that the hydropower projects in this case indeed added something new to the navigable waters because the project owners temporarily take "control" or "ownership" of water as it passes through the project dams. In the state court's view, the water ceases to be U.S. waters as it enters the dams, and the owner "adds" the water back to the navigable waters below the projects.

This novel analysis is simply off the mark. Nothing in section 401 or prior case law interpreting the section suggests that "ownership" or "control" of water is relevant, much less determinative, of whether the section applies to a given activity. Furthermore, this Court in *Miccosukee* made clear that moving water from one place in a water body to another does not constitute a "discharge." If temporary ownership or control – that is, temporarily removing water from a water body – were enough to constitute a discharge, *Miccosukee* would have had to come out the other way. This Court's "ladle of soup" analogy would have been impossible to make because it involves the exercise of control over water.

Moreover the state court's "ownership/control" test is based on a faulty premise. In fact, the mere passage of water through a hydropower project does not involve a change of "ownership" or "control" sufficient to make the water an "addition" to navigable waters. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (stating that "the running water in a great navigable stream is

[incapable] of private ownership. . . .") (quoting *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913)) (alteration in original).[17] Thus, the mere flow of water through a hydropower project does not involve a "discharge" necessary to trigger CWA section 401. The section does not apply to the licensing of existing projects in such circumstances.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

JEFFREY L. FISHER
(Counsel of Record)
DANIEL M. ADAMSON
DAVIS WRIGHT TREMAINE LLP
1500 K Street N.W., Suite 450
Washington, D.C. 20005
(202) 508-6600
Counsel for Amici Curiae

HENRI D. BARTHOLOMOT
EDWARD H. COMER
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2696

(Of Counsel Listing On Inside Cover)

[17] Water rights in the West are property interests and subject to protection under State and U.S. Constitutions, but do not rise to the level of "ownership" of the water. Such rights are usufructuary – they include a right to put the water to beneficial use – but the government retains ownership of the water.

Supreme Court, U.S.
FILED
JAN 6 - 2006
OFFICE OF THE CLERK

No. 04-1527

In The
Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.,

Respondents.

On Writ Of Certiorari To The Maine Supreme Judicial Court

BRIEF *AMICI CURIAE* OF FORMER ASSISTANT ADMINISTRATORS OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY J. CHARLES FOX, G. TRACY MEHAN III, AND ROBERT PERCIASEPE IN SUPPORT OF RESPONDENTS

ROBERT G. DREHER
Counsel of Record
1100 17th St., N.W.
Suite 1000
Washington, D.C. 20036
(202) 974-5114

JENNIFER CHAVEZ
HOWARD I. FOX
EARTHJUSTICE
1625 Massachusetts Ave., N.W.
Suite 702
Washington, D.C. 20036
(202) 667-4500

Attorneys for Amici

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE SCOPE OF THE ACT'S REGULATION OF DISCHARGES OF POLLUTANTS IS NOT AT ISSUE IN THIS CASE 4

II. IF THIS COURT NONETHELESS CONSIDERS THE PROPER SCOPE OF THE ACT'S REGULATION OF DISCHARGES OF POLLUTANTS, IT SHOULD RECOGNIZE THAT DISCHARGES OF DREDGED MATERIAL MAY BE REGULATED EVEN IF THEY OCCUR IN THE SAME WATER FROM WHICH THE MATERIAL WAS TAKEN 6

A. The 1972 Amendments Expressly Regulate Discharges of Dredged Material, Even Though Such Discharges Typically Involve the Movement and Redeposit of Pollutants Within United States Waters 6

B. The 1977 Amendments Confirm That the Act Was Intended to Regulate Movement of Pollutants Within United States Waters 9

C. Every Appellate Court to Consider the Issue Has Held That a Discharge Occurs When Dredged Material is Relocated From One Place in United States Waters to Another 10

TABLE OF CONTENTS – Continued

Page

III. A DECISION UNDERMINING THE ACT'S AUTHORITY TO REGULATE DISCHARGES OF DREDGED SPOIL WITHIN WATERS OF THE UNITED STATES WOULD HAVE GRAVE IMPACTS ON WATER QUALITY, FRUSTRATING THE ACT'S PURPOSES 13

CONCLUSION 17

APPENDIX A (HISTORIC PHOTOGRAPHS) A-1

APPENDIX B (BIOGRAPHIES OF *AMICI*) B-1

TABLE OF AUTHORITIES

Page

CASES

Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897 (5th Cir. 1983) 11, 16

Borden Ranch Partnership v. U.S. Army Corps of Engineers, 261 F.3d 810 (9th Cir. 2001), *aff'd*, 537 U.S. 999 (2002) 12

Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York, 273 F.3d 481 (2d Cir. 2001) 5

Greenfield Mills v. Macklin, 361 F.3d 934 (7th Cir. 2004) 12

National Mining Assn. v. U.S. Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998) 12, 13

Rybachek v. EPA, 904 F.2d 1276 (9th Cir. 1990) 12

South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) 4, 5

United States v. Brace, 41 F.3d 117 (3d Cir. 1994) 12

United States v. Deaton, 209 F.3d 331 (4th Cir. 2000) 11

United States v. Huebner, 752 F.2d 1235 (7th Cir. 1985) 11

United States v. M.C.C. of Florida, 772 F.2d 1501 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987), *analysis reaffirmed in relevant part on remand*, 848 F.2d 1133 (11th Cir. 1988) 11

STATUTES

Clean Water Act

§ 301, 33 U.S.C. § 1311 16

§ 401, 33 U.S.C. § 1341 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

§ 404, 33 U.S.C. § 1344 ..... *passim*

§ 502(6), 33 U.S.C. § 1362(6) 6

§ 502(12), 33 U.S.C. § 1362(12) ..... *passim*

§ 502(16), 33 U.S.C. § 1362(16) ..... *passim*

RULES & REGULATIONS

33 C.F.R. § 323.2(c) 6

40 C.F.R. § 232.2 6

Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 65 Fed. Reg. 50,108 (Aug. 16, 2000) 14, 15

Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 66 Fed. Reg. 4550 (Jan. 17, 2001) 14

LEGISLATIVE HISTORY

Dep't of the Army, Chesapeake Bay Study and Hydraulic Model, *in The Chesapeake and Delaware Canal: Hearings Before the House Committee on Public Works*, 91st Cong. 49 (1970) 8

S. Rep. No. 92-1236 (1972) 8

S. REP. No. 95-370 (1977) 10

Congressional debate concerning enactment of Clean Water Act Amendments of 1972 and 1977 ..... *passim*

OTHER MATERIALS

HUSTON, JOHN, P.E., HYDRAULIC DREDGING, THEORETICAL AND APPLIED (1970) 7, A-2

TABLE OF AUTHORITIES – Continued

Page

OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, WETLANDS: THEIR USE AND REGULATION 48-50, 124 (1984) 15

U.S. Army Corps of Engineers, Dredging Operations Technical Support Program, Historic Dredging Photos, *at* http://el.erdc.usace.army.mil/dots/photos/page8.html A-1

INTEREST OF *AMICI CURIAE*

Amici are former Assistant Administrators for Water of the United States Environmental Protection Agency ("EPA").[1] Each was responsible for administering the Clean Water Act ("the Act"), including responsibility for interpreting the meaning and scope of the Act's provisions in general rulemakings and specific permit adjudications. Each was also, at a different time in his career, a state environmental official with responsibility for administering the Clean Water Act's delegated programs. Each *amicus* has a longstanding professional expertise relevant to this case and a strong personal interest in the protection of the nation's waters. A fuller description of the backgrounds of the individual *amici* is set forth in Appendix B to this brief.

This case involves § 401 of the Act, which requires an applicant for a federal license or permit to obtain a certification from the appropriate State that any "discharge" from its project will comply with provisions of the Act. Petitioner S.D. Warren ("Warren") argues that the release of water from its dam does not constitute a discharge subject to § 401. *Amici* believe that, consistent with the long-standing interpretation and practice of § 401 by EPA and by the States, releases of water from dams plainly qualify as discharges under § 401. Because the State of Maine and other parties will thoroughly address the scope

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[1] Pursuant to S. Ct. R. 37.3(a) and 37.6, the undersigned affirm that (1) this brief is filed with the parties' written consent, copies of which have been filed with the Clerk, (2) no counsel for any party authored this brief in whole or in part, and (3) no person or entity other than *amici* or its counsel made a monetary contribution to the submission of this brief.

of § 401 in their merits briefs, *amici* do not address this point further in this brief.

Amici are concerned, however, that the Court's resolution of that issue could involve consideration of the scope of the Act's regulatory program under other provisions of the Act, and that certain of Warren's arguments could lead to an improperly narrow definition of that authority, frustrating the law's express terms as well as its purposes. Although this case involves the proper construction of § 401, and does not directly involve the provisions of the Act that regulate the "discharge of pollutants," petitioner S.D. Warren Company ("Warren") seeks to define the term "discharge" in § 401 by reference to those provisions. Warren observes that the phrase "discharge of a pollutant" is defined as an "addition" to a navigable water in § 502(12) of the Act, and argues that a release of water from one part of a river into another part of the same river cannot constitute a "discharge" because it does not "add" anything to the water body.

Amici believe Warren's argument is wrong as applied to § 401, since a "discharge" under that provision is broadly defined, and need not involve an "addition." Even with respect to the "discharge of pollutants" under other provisions of the Act, however, *amici* believe that Warren's argument is overly simplistic, and could, if adopted without qualification by the Court, inadvertently undermine the Act's regulation of discharges of dredged and fill material under § 404. *Amici* submit this brief to clarify that, at least with respect to discharges of dredged material, the movement and redeposit of material within a

single water body can plainly constitute an "addition" of a pollutant subject to regulation under the Act.

SUMMARY OF ARGUMENT

The scope of the Act's regulation of discharges of pollutants is not directly at issue in this case, which concerns the proper interpretation of the broader term "any discharge" under § 401. However, if the Court considers the Act's regulation of discharges of pollutants in resolving this case, the Court should recognize that movement and redeposit of a pollutant within a single water body can, at least in one important circumstance, constitute a discharge of a pollutant. Dredged spoil, by definition, is material taken from a water body, and is commonly redeposited within the same water body. Section 404 of the Act expressly regulates the discharge of such dredged material, reflecting Congress's concern about the degrading effects on water quality of such dredging-related disposal practices. The consistent judicial interpretation of § 404 by courts of appeals stretching back two decades thus confirms that movement of dredged or fill material within a single water body can constitute a discharge of a pollutant. Reading the Act in such a way as to exclude from regulation such redeposit of pollutants within the same water body would cause grave environmental impacts, undermining the purposes of the Act. Therefore, any consideration by the Court of the scope of the Act's authority to regulate discharges of pollutants should recognize that, at least with respect to dredged

material, the redeposit of material into the same water body can constitute a "discharge of a pollutant."

ARGUMENT

I. THE SCOPE OF THE ACT'S REGULATION OF DISCHARGES OF POLLUTANTS IS NOT AT ISSUE IN THIS CASE.

This case involves the proper interpretation of § 401 of the Act, which requires an applicant seeking a federal license or permit to conduct "any activity . . . which may result in any discharge into the navigable waters" to obtain a certification from the appropriate state that any such discharge will comply with specified provisions of the Act. Warren argues that the release of water from its dam does not constitute a "discharge" within the meaning of that provision. The Court can thus resolve this case simply by determining the proper meaning of the term "any discharge" in § 401.

Warren argues, however, that the term "any discharge" in § 401 must be understood by reference to the definition of "discharge of a pollutant" in § 502(12). In particular, Warren contends that a "discharge" under § 401 must involve an "addition" to the navigable waters, in accordance with that definition. Warren submits that its release of water from the reservoir above its dam into the riverbed below the dam is not an "addition" of anything, and thus cannot be a "discharge." Warren invokes this Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004),

for the proposition that a movement of material within the same water body cannot constitute an "addition."[2] The decision of the Maine Supreme Judicial Court below also addressed the term "addition" in § 502(12).

Whether a release of water from a dam may constitute an "addition" is not properly at issue in this case, however. Section 401 applies to "*any* discharge into navigable waters." When used in this way without qualification, § 502(16) of the Act makes clear that the term "discharge" *includes* a discharge of a pollutant and a discharge of pollutants. Because § 401 by its terms is not limited to "discharges of a pollutant," the Court need not address the meaning of that phrase, or consider whether a movement of material within the same water body constitutes an "addition" within its scope.

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[2] In *Miccosukee*, the Court remanded a claim that pumps moving water between a canal and an adjacent wetland that was a remnant of the original South Florida Everglades required a permit under § 402 of the Act, and directed the lower courts to determine whether the canal and the wetland constituted "meaningfully distinct water bodies." 541 U.S. at 112. The Court observed: "As the Second Circuit put it in *Trout Unlimited*, '[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot.'" *Id.* at 110 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2d Cir. 2001)). The Court's discussion of this point was *dictum*, since it was not an issue disputed by the parties. *See id.* at 104 (characterizing issue as "the application of agreed-upon law to disputed facts"); 110 (noting the Tribe did not dispute legal issue). Moreover, the Court's discussion addressed discharges subject to § 402 of the Act; the Court did not consider discharges under § 401 or discharges of dredged or fill material under § 404.

II. IF THIS COURT NONETHELESS CONSIDERS THE PROPER SCOPE OF THE ACT'S REGULATION OF DISCHARGES OF POLLUTANTS, IT SHOULD RECOGNIZE THAT DISCHARGES OF DREDGED MATERIAL MAY BE REGULATED EVEN IF THEY OCCUR IN THE SAME WATER FROM WHICH THE MATERIAL WAS TAKEN.

A. The 1972 Amendments Expressly Regulate Discharges of Dredged Material, Even Though Such Discharges Typically Involve the Movement and Redeposit of Pollutants Within United States Waters.

Section 301(a) of the Act, enacted in 1972, prohibits the "discharge of any pollutant." Section 502(6) expressly defines "pollutant" to include "dredged spoil," and § 404(a) authorizes the Secretary of the Army to issue permits for the "discharge of dredged or fill material." These provisions reflect Congress's concern about the impacts caused by the disposal of dredged material, and demonstrate Congress's intent to regulate discharges that involve the movement and redeposit of pollutants – *i.e.*, dredged materials – within a single water body.

The very nature of dredged spoil and dredged material – as confirmed by regulations adopted upon enactment of § 404 by EPA and the U.S. Army Corps of Engineers ("Corps") – is that they originate in United States waters. *See* 40 C.F.R. § 232.2 (EPA regulation defining "dredged material" as "material that is excavated or dredged from waters of the United States"); 33 C.F.R. § 323.2(c) (Corps regulation similarly defining "dredged material"). Thus, any discharge of dredged material inherently involves *moving* material that originated in United States waters – not

introducing material to those waters from an external source.

Dredging practices common when Congress enacted § 404 unmistakably involved the movement of dredged sediments from one location to another within the same water body. One common practice, the redeposit of dredged material into water near the channel where it was dredged, is depicted in historic photographs reproduced in Appendix A to this brief. Contemporary engineering texts also discuss open water disposal of dredged material by hydraulic dredges. *See, e.g.*, HUSTON, JOHN, P.E., HYDRAULIC DREDGING, THEORETICAL AND APPLIED (1970). Among the common practices discussed is the use of side-casting booms to discharge dredged material back into the water near the channel being dredged. *See id.* at 21 (photograph of a dredge using "[t]wo 24-inch discharges [that] extend 290 feet outward" to discharge directly into the water); *id.* at 23 (photograph of "one of the first hopper dredges to carry a side-casting boom which enables it to discharge spoil more than 160 feet from the side of the cut," into the water); and *id.* at 118, 120 (photograph and description of equipment used to direct the flow of spoil "when spoil is being dumped in water adjoining a cut"). Huston notes that "[s]ilt, mud, and other soft materials which are more-or-less valueless for reclamation uses, are disposed of *wherever possible*." *Id.* at 117 (emphasis added).

Congress's awareness of the ecological impacts of dredging-related disposal practices, and of the fact that dredging typically involved a redeposit of dredged material into the waters from which it was drawn, is demonstrated in a 1970 hearing concerning the Chesapeake Bay. A study included in the record of that hearing noted that, with the need to deepen shipping channels in the Chesapeake Bay,

"[t]he disposal of spoil in the Bay becomes of increasing concern." Dep't of the Army, Chesapeake Bay Study and Hydraulic Model, *in The Chesapeake and Delaware Canal: Hearings Before the House Committee on Public Works*, 91st Cong. 49 (1970). The study states:

> The tons of muck removed from ship channels – the spoil – must be disposed of somewhere. All too often in the past, it has been dumped in the cheapest and most convenient location near the channel being dredged . . . The deposition of spoil from such dredging directly on top of oyster beds or so close that the silt smothers both the oysters and all other associated bottom life is also destructive.

Id.

Congress's concerns for the impacts of such dredging-related disposal practices on the aquatic ecosystem underlay the enactment of § 404. The Senate Conference Report on the 1972 amendments urged EPA and the Corps to "end the process of dumping dredged spoil into water – to limit to the greatest extent possible the disposal of dredged spoil in the navigable inland waters of the United States. . . ." S. Rep. No. 92-1236, *reprinted in* A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 at 177-178 (1972) (*hereinafter* LEGIS. HIST.). *See also id.* at 421-24 (statement of Rep. Vanik).

Moreover, in determining to regulate the discharge of dredged material, Congress fully recognized that dredged spoil is typically deposited in the same water from which it is drawn. According to the sponsor of the floor amendment that first proposed assigning the Corps permitting authority over the discharge of dredged material, such discharge involves "moving spoil material from one place in the

waterway to another, without the interjection of new pollutants." 1972 LEGIS. HIST. 1387 (statement of Sen. Ellender). *Accord*, *id.* at 1386 ("The disposal of dredged material does not involve the introduction of new pollutants; it merely moves the material from one location to another.").

B. The 1977 Amendments Confirm That the Act Was Intended to Regulate Movement of Pollutants Within United States Waters.

The 1977 Amendments further confirm that Congress intended for the Act to regulate discharges of dredged material, notwithstanding that such discharges involve movement of pollutants within United States waters rather than introduction of pollutants to such waters from an outside source. The 1977 amendments enacted conditional exemptions for specified kinds of dredged material discharges, § 404(f)(1), but provided that those same discharges are subject to point source requirements for toxics, § 404(f)(1) (citing CWA § 307), and must obtain a point source permit where impacts on United States waters would be significant. Sec. 404(f)(2).

Tellingly, among the discharges that are subject to point source requirements in these circumstances are several that plainly involve relocation of dredged material within the same water body. These include, for example, discharges associated with "plowing" and "the maintenance of drainage ditches" in waters of the United States. Sec. 404(f)(1)(A) and (C).

Moreover, Congress worded § 404(f)(1)(C) narrowly to encompass only the "maintenance," but not the *construction*, of drainage ditches in wetlands. Thus, Congress

confirmed that ditch construction in United States waters – which typically involves relocation of dredged material over short distances – lacks even a *conditional* exemption from permitting.[3] Finally, the 1977 Amendments added an exemption for agricultural drainage, but limited it to "*minor* drainage." Sec. 404(f)(1)(A) (emphasis added). The drafters explained that "[t]he exemption for minor drainage does not apply to the drainage of swampland or other wetlands." S. REP. 95-370 76 (1977), *reprinted in* 1977 LEGIS. HIST. 709.[4] Congress' intent to regulate discharges associated with agricultural drainage activities – which likewise typically involve relocation of dredged material over short distances – further demonstrates that the relocation of pollutants within United States waters can involve a regulable discharge.

C. Every Appellate Court to Consider the Issue Has Held That a Discharge Occurs When Dredged Material is Relocated From One Place in United States Waters to Another.

The courts of appeals have consistently held, in a line of cases stretching back two decades, that a discharge occurs when dredged material is relocated from one place

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[3] *Accord*, 1977 LEGIS. HIST. 906 (colloquy of Sens. Muskie and Bentsen confirming that conditional exemptions do not include construction of drainage ditches).

[4] *Accord*, 1977 LEGIS. HIST. 1042 (statement of Senator Muskie noting that permits are required where ditches or channels are dredged in a swamp or other aquatic area; *id.* (Senator Dole) (noting that construction of canals or waterways designed to modify significantly or drain a swamp or marshland does not fall within the exemption for "minor drainage").

in United States waters to another, including redeposits *within* a single water body. The seminal case is *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983), which considered whether the redeposit of soil and other materials excavated in a wetland during land clearing activities constituted a discharge of fill material under § 404. The court observed:

> No one has urged here that the materials must come from an external source in order to constitute a discharge necessitating a § 404 permit, nor would we expect them to, since § 404 refers to "dredged" or "fill" material. . . . "[D]redged" material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute.

Id. at 924 n.43.

Relying on this principle, *Avoyelles* and other appellate decisions have found that relocating dredged or fill material within a single water body indeed constitutes a "discharge of a pollutant." *See, e.g., Avoyelles*, 715 F.2d at 920-26 (relocation of soil and other material within wetland constituted a discharge); *United States v. M.C.C. of Florida*, 772 F.2d 1501, 1505-06 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987), *analysis reaffirmed in relevant part on remand*, 848 F.2d 1133 (11th Cir. 1988) (tugboat propellers added dredged material by stirring up sediment that then settled on adjacent seagrass beds); *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000) (relocation of dredged material from a ditch to the edge of the ditch constituted an "addition"); *United States v. Huebner*, 752 F.2d 1235, 1241-43 (7th Cir. 1985) (§ 404

permit required for use of earthmoving equipment to spread soil around wetlands); *United States v. Brace*, 41 F.3d 117, 127-29 (3d Cir. 1994) (same); *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 815-16 (9th Cir. 2001), *aff'd*, 537 U.S. 999 (2002) (same). *Cf. Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (resuspension of sediments taken from streambed after removal of minerals during mining operation constituted a discharge).

This interpretation was recently confirmed by the Seventh Circuit in *Greenfield Mills v. Macklin*, 361 F.3d 934 (7th Cir. 2004). There the court found an addition occurred when the defendants opened a dam and the resulting flow scoured the river bottom and deposited sediment downstream. *Id.* at 947-49. According to the court, "it is logical to believe that soil and vegetation removed from one part of a wetland or waterway and deposited in another could disturb the ecological balance of the affected areas – both the area from which the material was removed and the area on which the material was deposited." *Id.* at 949.

Even the most restrictive appellate decision on the issue agrees that relocation of dredged material within United States waters – indeed, within a single water body – can constitute an addition. In *National Mining Assn. v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), the D.C. Circuit held that "incidental fallback," which occurs when dredged material is returned "virtually *to the spot* from which it came," *id.* at 1403 (emphasis added), does not constitute an "addition." *Id.* at 1405. However, the court acknowledged that relocation of dredged material to a *different* spot – even within the *same* water body – can constitute an "addition" and thus a

discharge. *Id.; accord id.* at 1402 (stating that the court was not questioning § 404 jurisdiction over "sidecasting," a practice that "involves placing removed soil . . . by the side of an excavated ditch"); 1407 (stating that the court did not question the regulation of "redeposits at some distance from the point of removal."). Likewise, *National Mining* expressly confirmed that *plowing* – which also involves relocation of dredged material a minimal distance from where it originated – can constitute an "addition." *Id.* at 1405.

These judicial decisions addressing dredged and fill material confirm that movement of pollutants within United States waters – indeed, within a single water body – can constitute an addition of a pollutant under the Act.

III. A DECISION UNDERMINING THE ACT'S AUTHORITY TO REGULATE DISCHARGES OF DREDGED SPOIL WITHIN WATERS OF THE UNITED STATES WOULD HAVE GRAVE IMPACTS ON WATER QUALITY, FRUSTRATING THE ACT'S PURPOSES.

Discharges of dredged material significantly degrade water quality, and do so regardless whether the dredged material originates in the same water body where it is discharged or comes from an entirely separate water body. Congress aimed to address two interrelated ecological effects of discharging dredged spoil into U.S. waters under § 404: "First, the destruction and degradation of aquatic resources that results from replacing water with dredged material or fill material; and second, the contamination of water resources with dredged or fill material that contains toxic substances." 1977 LEGIS. HIST. 910 (statement of Sen. Stafford). Congress recognized that "[t]o limit the jurisdiction

of the [Act] with reference to discharges of the pollutants of dredged or fill material would cripple efforts to achieve the act's objectives." *Id.* at 911. *See also id.* at 417, 881-82, 888, 906-08, 916-19, 921-23, and 929 (remarks of Rep. Dingell and Sens. Stafford, Hart, Chafee, Baker, and Muskie).

Congress's concern is well warranted. Discharges of dredged material can have several serious impacts on water quality. As EPA has recognized,

> [E]xcavation and channelization activities typically result[] in suspension and distribution of material into the water column where it raises turbidity levels and may release contaminants into the water column. The result is that toxics, metals and other pollutants that were buried in sediment, held by anaerobic soils, or taken up by submerged aquatic vegetation, can be released and distributed in the water column and become available to fish and other aquatic life and degrade water quality. In addition, the dredged material suspended in the water column can be carried far downstream from the excavation point by river, stream, ditch, or wetland current before it settles out.

Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 65 Fed. Reg. 50,108, 50,112 (Aug. 16, 2000). *See id.* at 50,112-13 (describing how wetland soils trap and immobilize toxic and nontoxic pollutants, and how excavation activities and redeposit of dredged material leads to the release and resuspension of pollutants in the water column, with serious effects on the aquatic ecosystem). *Accord, e.g.*, 66 Fed. Reg. 4550, 4563-65 (Jan. 17, 2001) (preamble to final rule) (discussing scientific evidence regarding effects of

disturbance of sediments and redeposit of dredged material on water quality); OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, WETLANDS: THEIR USE AND REGULATION 48-50, 124 (1984) (describing vital role that wetlands play in trapping toxic and nontoxic pollutants, and how excavation and redeposit of dredged material can release such pollutants).

As EPA has recognized, "the impacts resulting from redeposit of dredged material are not limited to contaminated material alone." Further Revisions, *supra*, 65 Fed. Reg. at 50,113. The suspension of sediments in the water column causes increased turbidity, which "can also harm aquatic life, smothering fish nurseries, mussels and benthic life and killing submerged aquatic vegetation." *Id.* The Fourth Circuit noted in *Deaton, supra*: "Even in a pristine wetland or body of water, the discharge of dredged spoil, rock, sand, and biological materials threatens to increase the amount of suspended sediment, harming aquatic life." 209 F.3d at 336. Moreover, the deposit of dredged or fill material can destroy functioning wetlands, eliminating their capacity to filter pollutants. *Id.*

Because these ecological impacts occur even when material is moved a short distance within the water body, it would make no sense to exclude such discharges from the purview of the Act. As the Fourth Circuit observed in *Deaton*:

> These effects are no less harmful when the dredged spoil is redeposited in the same wetland from which it was excavated. The effects on hydrology and the environment are the same. Surely Congress would not have used the word "addition" (in "addition of any pollutant") to prohibit the discharge of dredged spoil in a wetland,

> while intending to prohibit such pollution only when the dredged material comes from outside the wetland.

Id.

Indeed, as the Fifth Circuit noted in *Avoyelles*, reading the term "discharge" as requiring an "addition" of material from outside U.S. waters would virtually nullify the prohibition against unpermitted discharge of dredged material in §§ 301 and 404 altogether. Since dredged spoil by its very definition originates from U.S. waters, no discharge of dredged spoil would be covered under this reading, a result that clearly would be absurd in light of the Act's plain language in §§ 301 and 404. However, even a narrower holding that an "addition" does not occur when pollutants are moved within a single water body would have a crippling effect on the § 404 program, since most discharges of dredged material involve merely "moving spoil material from one place in the waterway to another." 1972 LEGIS. HIST. 1387 (statement of Sen. Ellender).

CONCLUSION

Because this case solely involves § 401, *amici* do not believe that this Court need even address the definition of "discharge of a pollutant" or the meaning of the term "addition" in § 502(12). If the Court does consider these issues, however, *amici* urge the Court to recognize that movement and redeposit of dredged or fill material within a single water body can constitute a "discharge of a pollutant."

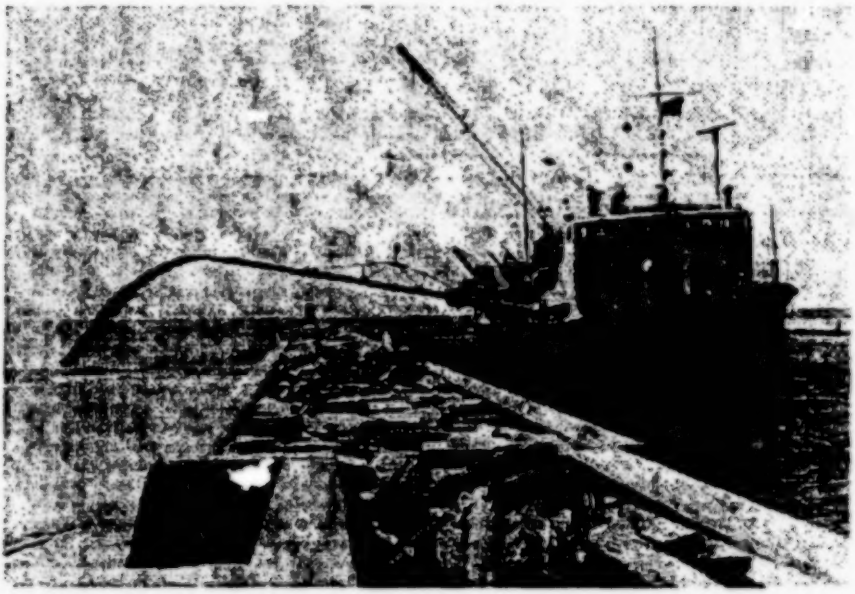
Respectfully submitted,

ROBERT G. DREHER
Counsel of Record
1100 17th St., N.W.
Suite 1000
Washington, D.C. 20036
(202) 974-5142

JENNIFER CHAVEZ
HOWARD I. FOX
EARTHJUSTICE
1625 Massachusetts Ave., N.W.
Suite 702
Washington, D.C. 20036
(202) 667-4500

Attorneys for amici

U.S. Army Corps of Engineers, Dredging operations Technical Support Program, Historic Dredging Photos, *at* http://el.erdc.usace.army.mil/dots/photos/page8.html.



The caption to this 1962 photo reads "Hains Casting-Over-the-Side, White Lake, Michigan."

Dredge discharging spoil directly into the water near the dredged channel.

HUSTON, JOHN, P.E., HYDRAULIC DREDGING, THEORETICAL AND APPLIED 23, 120 (1970).

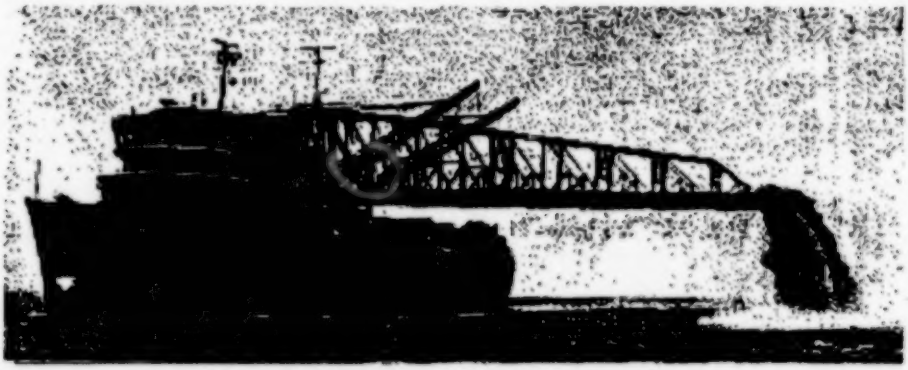


Fig. 24. Modern Hopper Dredge.
Boom is 160 feet long. (Corps of Engineers)

Dredge with a side-casting boom enabling it to discharge spoil near the channel being dredged.

Fig. 103. Baffle Plate Effect. (ARMCO Steel Corp.)

Dredge discharging spoil into the water near the dredged channel.

J. Charles Fox served as Assistant Administrator for Water of the United States Environmental Protection Agency from 1998 to 2001. He served as Assistant Secretary and Chief Operating Officer of the Maryland Department of the Environment from 1995 to 1997, and subsequently served as Secretary of the Maryland Department of Natural Resources and as Chair of the Governor's Chesapeake Bay Cabinet from 2001 to 2003.

G. Tracy Mehan III served as Assistant Administrator for Water of the United States Environmental Protection Agency from 2001 to 2003. He served as Director of the Michigan Office of the Great Lakes from 1993 to 2001, and as Director of the Missouri Department of Natural Resources from 1989 to 1992.

Robert Perciasepe served as Assistant Administrator for Water of the United States Environmental Protection Agency from 1993 to 1998. He served as Secretary of the Maryland Department of the Environment from 1990 to 1993.

Supreme Court, U.S.
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13

No. 04-1527

In the Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner

v.

MAINE DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Respondent

ON WRIT OF CERTCIORARI TO THE
MAINE SUPREME JUDICIAL COURT

BRIEF AMICI CURIAE OF THE FRIENDS OF THE EVERGLADES IN SUPPORT OF THE RESPONDENTS

John E. Childe
606 Pine Road
Palmyra, Pa. 17078
(717) 520-1510

Counsel of Record for
Amici Curiae
Friends of the Everglades

AMERICAN FINANCIAL PRINTERS • (202) 464-5500

QUESTION PRESENTED

Whether a state has conditioning authority pursuant to section 401 of the Clean Water Act, 33 U.S.C. § 1341, for the relicensing of a hydroelectric dam, the operation of which involves the discharge of water back into the river after it has passed through the turbines and other dam structures, and results in continuing negative impacts to the water quality of the river?

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES. iv

INTERESTS OF *AMICUS CURIAE*. 1

SUMMARY OF ARGUMENT. 3

ARGUMENT 7

A. The Supreme Court Opinion In *South Florida Water Management District v. Miccosukee Tribe of Indians* Did Not Hold That There Is No Addition Of Pollution From One Water Body To Another If There Is No Meaningful Distinction Between The Two Water Bodies 7

B. Section 304(f)(2)(F) Of The Clean Water Act Is Not An Exemption For Movement Though Dams As Nonpoint Sources 10

C. The Inquiry Must Be Whether There Is A Discharge Of Pollutants 12

D. The September 15, 2005 EPA Interpretation Merits No Deference 14

E. Nonpoint Sources Are Not Exempt From Point Source Provisions Of The CWA. 20

F. There is No Distinction Between Pollution And Pollutants 23

CONCLUSION 24

TABLE OF CITATIONS

CASES: **PAGE**

Chevron v. Natural Resources Defense Council, Inc.
467 U.S. 837 (1984). 14, 15

Consumer prod. Safety Comm'n v. GTE Slyvania, Inc.
447 U.S. 102, 108 (1980) 15

Edward Christensen, et. at., v. Harris County, et. al
529 U.S. 576, 582-83 (2000) 17

EPA v. California ex rel. State Water Resources Control Board (EPA v. California)
426 U.S. 200 (1976). 18

Friends of Everglades v. South Florida Water Management District
Southern District of Florida, District Court Case No.02-80309 6

Hodel v. Virginia Surface Mining & Reclaimation Assn., Inc
452 U.S. 264, 282 (1981) 21

Milwaukee v. Illinios
451 U.S. 304 (1981) 18, 21

Nat'l Wildlife Fed'n v. Consumers Power Co.
862 F.2d 580 (6th Cir. 1988) 10

Nat'l Wildlife Fed'n v Gorsuch
693 F.2d 156 (D.C. Cir. 1982). 9, 10

Oil, Chemical 7 Atomic Workers Int'l v. RMI Taitanium Co.
199 F.3d 881, 894 (6th Cir. 2000) 23

PUD No. 1 of Jefferson County et al. Washington Department of Ecology et. al.
551 U.S. 700,720 (1994) 21

Robinson v. Shell Oil Co.
519 U.S. 337, 340 (1997) 15

Skidmore v. Swift & Co.
323 U.S. 134 (1944) 14, 15

South Florida Management District v. Miccosukee Tribe of Indians
541 U.S. 95 (2004) . . . . . *passim*

United States v. Heirs of Boisdore
49 U.S. 113 (1849) 12

United States v. Earth Sciences, Inc.
599 F.2d 368, 373 (10th Cir. 1979) 22

U.S. v. Mead Corp.
533 U.S. 218, 226 (2001). 14

STATUTES:

Clean Water Act

33 U.S.C. Section 1251 (a). 16, 23
33 U.S.C. Section 1311 (a). 3,.16
33 U.S.C. Section 1341 . . . . . 1, 3, 7
33 U.S.C. Section 1342 . . . . . 1, 3, 7
33 U.S.C. Section 1314 (f)(1)(2)(F). 3, 5, 22

33 U.S.C. Section 1362 . . . . . *passim*

CODE OF FEDERAL REGULATIONS:

40 CFR 122.23 12
40 CFR 122.26 (a)(1)(ii), (b)(14)(iii) 12
40 CFR 122.26 (a)(9)(i). 12
40 CFR 122.34 (b)(i).. 12

INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Friends of the Everglades ("Friends") respectfully submits this brief supporting the findings below upholding the State of Maine's determination to issue water quality certification conditions on the relicensing of the hydropower dams owned and operated by S.D. Warren on the grounds that releases of water from the dams into the Presumpscot River constitute "any discharge," whether or not the releases meet the definition of "discharge of pollutants".

Amicus Curiae Friends of the Everglades is a non-profit association whose members' interests are in the protection and enhancement of the Natural Everglades ecosystem, a vast marshland which covers much of South Florida. It begins in the Kissimmee River watershed and flows through Lake Okeechobee and the Everglades, including the Loxahatchee National Wildlife Refuge and the Everglades National Park, and ends at Florida Bay.

Amicus Curiae has a significant stake in this Court's determination of the issues raised by the Petitioner in its Brief submitted to this Court. Petitioner argues that the test to determine whether the Federal Clean Water Act ("CWA") requires a Certification under section 401 of the Act, 33 U.S.C. § 1341, is the same test as is required under the Act to determine whether a permit is required to discharge pollutants under section 402 of the Clean Water Act, 33 U.S.C. § 1342. Petitioner then alleges that the findings below are contrary this Court's findings in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

Amicus Curiae Friends of the Everglades were Co-respondents before this Court in *Miccosukee*. The case was remanded by this Court, and is currently in the District Court for the Southern District of Florida under the mandate of this

Court to make a factual determination as to whether there is no meaningful distinction between the natural Everglades area and the C-11 drainage basin from which polluted water is discharged by the S-9 pump station into the Everglades. A ruling by this Court in favor of Petitioner's argument could significantly effect the interests of *Amicus* in the *Miccosukee* case.

Both the Petitioner and the Respondent have consented to the filing of this *Amicus Curiae* Brief.

SUMMARY OF ARGUMENT

The principle issue raised by the Petitioner in the case before this Court is if the State of Maine can impose conditions on recertification of discharges from several dams owned and operated by S.D. Warren Company on the Presumpscot River under section 401 of the Federal Clean Water Act ("CWA"), 33 U.S.C. § 1341. In support of its position that the Maine decision was inappropriate, the Petitioner relies on this Court's recent decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); as well as Environmental Protection Agency's ("EPA") recent Interpretation of the Clean Water Act of August 5, 2005, both of which deal with the authority to issue permits under section 402 of the Act, 33 U.S.C. § 1342. These are National Pollutant Discharge Elimination System ("NPDES") permits. Petitioner also asserts the relevance of section 304(f)(2)(F) of the CWA, 33 U.S.C. § 1314(f)(2)(F), as support for the argument that dams, such as the petitioner owns, are nonpoint sources of pollutants rather than point sources, which are exempted under section 402 NPDES permit requirements.

Petitioner asserts that the section 402 arguments are relevant in an inquiry of the appropriateness of a section 401Certification requirement because the requirement to determine if there is "any discharge" under section 401(a) is the same as the requirement to determine if there is a "discharge of pollutants" under section 301(a) of the Act, 33 U.S.C. § 1311(a), that would then require an NPDES permit under section 402.

The *Amicus Curiae* Friends of the Everglades will not address the issue of whether section 401 Certification and section 402 Permitting should be required to meet the same test of whether there is a discharge of pollutants. Instead, the Friends of the Everglades will address the issues of whether this Court's determination in *Miccosukee* is correctly stated by the Petitioner and is relevant to this case; whether the Petitioner's reliance on section 304(f)(2)(F) is appropriate; and whether the EPA Interpretation cited by Petitioner is

supportable.

The Petitioner cites the decision of this Court in *Miccosukee* as holding that the question of whether a NPDES permit is required turns on whether the waters being discharged to are meaningfully distinct from the waters discharged from. (Pet. Br. at 21). It is the belief of *Amicus Curiae* that this Court in *Miccosukee* made no such finding. The case was remanded below with this Court's mandate to resolve a factual dispute raised by the South Florida Water Management District ("WMD"). This Court specifically reserved making any decision in *Miccosukee* on the meaning of "discharge of pollutants" determined by the District Court or the Eleventh Circuit Decision until the Courts below complied with the mandate to reopen the record to resolve the factual dispute.

The often repeated test which Congress imposed by definition to determine what "discharge of a pollutant" means is, "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). There is no exemption under this test for a discharge within the same water body.

The first part of this test Congress imposed is to determine whether a pollutant is being **added to** a navigable water. So the inquiry must begin with evaluating the receiving body of water to determine if a pollutant is being added. Congress limits the inquiry as to where the pollutants came from to whether the pollutants are discharged "from a point source," not from where the pollutants originated. This court made this clear in *Miccosukee* when it determined that the NPDES program is not limited to when a point source is the originator of the pollutants being discharged, but also includes when pollutants originating elsewhere merely pass through the point source. The point source "need only convey the pollutant to 'navigable waters' which are, in turn, defined as 'the waters of the United States.'" *Miccosukee*, 541 U.S. at 105.

At the conclusion of *Miccosukee*, this Court speculated that "it is possible that the District Court will conclude that C-11 and WCA-3 are not meaningfully distinct water bodies. If it does so, then the S-9 pump station will not need an NPDES permit." Id. at 112. This statement is not a new legal standard

enunciated by this Court as to when an "addition of a pollutant" does or does not occur that would result in the need for an NPDES permit. The only support for the statement that the S-9 would not need an NPDES permit if the WCA-3 is not meaningfully distinct from the C-11 drainage basin is the Court's previous statement in *Miccosukee* that, "The Tribe (meaning both the Tribe and Friends of the Everglades), does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping from one into the other cannot constitute an "addition of pollutants." Id. at 109.

When *Miccosukee* was released the Tribe filed a Petition For Rehearing for the limited purpose of correcting the above cited statements. The briefs of both Respondents Tribe and Friends were cited, as well as excerpts of the transcript of the Oral Argument, to support the fact that both parties had argued that a discharge from one part of a water body to another part of that same water body could require a NPDES permit. (Friends App. at pp. 1-8).

Petitioner S.D. Warren's reliance on section 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F), as support for the argument that a dam discharge is a nonpoint source discharge, and therefore not subject to the requirement for a NPDES permit is based on a basic misunderstanding of the section.

Through section 304(f) of the CWA, Congress required EPA to consult with federal and state agencies in order to develop and issue information including for two numerically designated purposes. The first, section 304(f)(1), 33 U.S.C. § 1314(f)(1), is to establish guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants. The second, section 304(f)(2), 33 U.S.C. § 1314(f)(2), is to develop information on processes, procedures, and methods to control pollution resulting from six different sources, listed as (A) through (F).

Section 304(f)(2)(F), which is what Petitioner relies on, is "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." These activities are not nonpoint

sources, as identified in section 304(f)(1), but are other sources of pollution. EPA currently regulates three of those other sources, sections 304(f)(2)(A), (B) and (C) under section 402 NPDES permits.

The terms of section 304 (f)(2)(F) and the definition of "point source" are quite similar. The basic difference between these two provisions of the CWA is the phrase in the definition of "point source" that states, "from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The only way to determine if an activity that could be either a "change in movement, flow, or circulation of any navigable water..." under section 304(f)(2)(F), or a point source discharge as defined in section 502(14), 33 U.S.C. § 1362(14), is to **determine if there is or might be a discharge of pollutants** as a result of that discharge activity into our nation's waters.

The EPA Interpretation cited by and relied on by the Petitioner, at page 22 of its Brief, was introduced by EPA on August 5, 2005, as an Exhibit in support of its Motion For Summary Judgment as to Intervenor Defendant in the case of *Friends of the Everglades v. South Florida Water Management District*, Case No.02-80309, Southern District of Florida. (EPA Interpretation Memorandum).

Because there are material facts in dispute, the Judge in the *Friends of the Everglades* case has denied all parties' motions for summary judgment, and has ordered trial to commence on January 9, 2006.

ARGUMENT

A. The Supreme Court Opinion In *South Florida Water Management District v. Miccosukee Tribe of Indians* Did Not Hold That There Is No Addition Of Pollution From One Water Body To Another If There Is No Meaningful Distinction Between The Two Water Bodies.

The Petitioner S.D. Warren Company, at page 21 of its memorandum submitted to the Court, attempts to argue that this Court's Opinion in *Miccosukee*, holds that the definitional requirement that there must be an "addition of pollutants" turns on whether the water being discharged from is or is not "meaningfully distinct" from the water being discharged into. 541 U.S. 95 (2004).[1]

It is the belief of *Amicus Curiae* that this Court in *Miccosukee* made no such finding. The case was remanded with this Court's mandate to resolve a factual dispute raised by the South Florida Water Management District. The District alleged that there is no meaningful distinction between the water being discharged into, the Everglades area known as Water Conservation Area 3-A (WCA-3), and the water being discharged from by the S-9 pump station, the drainage canal known as the C-11 Canal, and they are thus essentially one water body.

This Court determined that the factual dispute in *Miccosukee* made the District Court's summary judgment

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[1] This Court in *Miccosukee* did not address the meaning of "any discharge" in section 401 of the Clean Water Act, 33 U.S.C. §1341, to determine if a certification is required. In *Miccosukee* the question was whether a National Pollution Discharge Elimination System (NPDES) permit under section 402 of the Clean Water Act ("CWA"), 33 U.S.C.§ 1342, is required. A permit under section 402 requires the determination that there is a "discharge of any pollutant by any person," as required by section 301(a), 33 U.S.C. §1362(12). These are two different tests, as are the purposes between sections 401 and 402 of the CWA.

premature. This Court specifically reserved making any decision in *Miccosukee* on the legal issue of the meaning of the term "any addition of any pollutant" until the courts below complied with the mandate to reopen the record to resolve the factual dispute. 541 U.S. at 103.

At the conclusion of *Miccosukee* this Court speculated that "it is possible that the District Court will conclude that C-11 and WCA-3 are not meaningfully distinct. If it does so, then the S-9 pump station will not need an NPDES permit." Id. at 112. This statement is not a new legal standard enunciated by this Court as to when an "addition of a pollutant" occurs that would require an NPDES permit.

The only support for the statement that the S-9 would not need an NPDES permit if the WCA-3 is not meaningfully distinct from the C-11 drainage basin is the Court's previous statement in *Miccosukee* that, "The Tribe (meaning both the Tribe and Friends of the Everglades), does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping from one into the other cannot constitute an "addition of pollutants." *Id.* at 109.

When the *Miccosukee* Opinion was released the Tribe filed a Petition For Rehearing, with the consent of the Friends of the Everglades, for the limited purpose of correcting the above cited statements. The briefs of both Respondents Tribe and Friends were cited, as well as excerpts of the transcript of the Oral Argument, to support the fact that both parties had argued that a discharge from one part of a water body to another part of that same water body could require an NPDES permit.[2] (Friends App. at pp. 1-8).

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[2] Several examples illustrate the problem with suggesting that a discharge within the same water body could not constitute an addition of pollutants. In a lake there are deep parts usually in the center where sediments settle, and there are often shallow areas around the edge of the lake, that have different plant and aquatic life. If the sediments from the middle of the lake were pumped through a pipe to the shallow areas of the lake where grasses grow those shallows areas would be severely harmed by the sediment, which is a pollutant. Also, in many streams and rivers there can be different areas that have different characteristics of chemistry,

It is clear from the arguments raised by the Petitioner in this case that the misconceptions of the Court Opinion raised in the Petition for Rehearing in the *Miccosukee* case are causing confusion in the courts below.

The purpose of the South Florida Water Management District's use of the term "not meaningfully distinct" was to argue that there could be no "addition of any pollutant" from one body of water, the Everglades, to the other, the C-11 drainage basin, if they were significantly similar enough to be considered one water body.

The often repeated test, which Congress imposed by definition, to determine what "discharge of a pollutant" means is, "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). There is no exemption under this test for a discharge within the same water body.

The first part of this test Congress imposed is to determine whether a pollutant is being **added to** a navigable water. So the inquiry must begin with evaluating the receiving body of water to determine if a pollutant is being added. Congress limits the inquiry as to where the pollutants came from to whether the pollutants are discharged "from a point source," **not from where the pollutants originated**. This Court made this clear in *Miccosukee* when it was determined that the NPDES program is not limited to when a point source is the originator of the pollutants being discharged, but also includes when pollutants originating elsewhere merely pass through the point source. The point source "need only convey the pollutant to 'navigable waters,' which are, in turn, defined as 'the waters of the United States.'" *Miccosukee*, 541 U.S. at 105.

The "not meaningfully distinct water body" argument as raised by the South Florida Water Management District in *Miccosukee* was an attempt to tie in the facts of the case with the often cited "dam" cases, *Nat'l Wildlife Fed'n v. Gorsuch,*

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temperature, depth, plant and other aquatic life, to the point where the discharge of water from one part to the other could cause harm.

693 F.2d 156 (D.C. Cir. 1982); and *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), which held, based on EPA Opinions, that a dam, which is a point source, does not add any pollutants to a water body if the pollutants are already in that same water body. The District argued that the C-11 Canal and the Everglades area known as WCA-3 are hydrologically indistinguishable parts of a single water body. (Pet. Br. at 48).

In the "dam" cases, *Gorsuch* and *Consumers Power*, EPA took the position that under section 304(f)(2)(F) of the Act, 33 U.S.C. § 1314(f)(2)(F), discharges from dams are exempt from NPDES permits as nonpoint sources under the language of section 304(f)(2)(F) of the Act, 33 U.S.C. § 1314(f)(2)(F) . *Gorsuch*, 693 F.2d at 169. Further, the EPA took the very narrow view that the definition of pollutants under the Act was limited to the specific terms within the definition at section 502(6), 33 U.S.C. § 1362(6), and did not include such things as low dissolved oxygen, changes in temperature and supersaturation, arguing that these changes were water "conditions" not substances. Id. at 171. And finally, EPA took the position that an addition of a pollutant from a point source occurs only if the point source itself introduces a pollutant into water **from the outside world**. *Id.* at 175. In both of these cases the Circuit Courts relied heavily on the EPA Opinions, based on the concept of deference, and found that the dam discharges in question did not need to have an NPDES permit.

B. Section 304(f)(2)(F) Is Not An Exemption For Nonpoint Sources.

Through section 304(f) of the CWA, Congress required EPA to consult with federal and state agencies in order to develop and issue information including for two numerically designated purposes. The first, section 304(f)(1), is to establish guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants. The second, section 304(f)(2), is to develop information on processes, procedures

and methods to control pollution resulting from six different sources, listed as (A) through (F). Section 304(f)(1) of the CWA deals with nonpoint sources, not section 304(f)(2).

The EPA and the Courts in the "Dam" cases assume that discharges from dams within the same water body should be treated as a nonpoint sources based on the terms of section 304(f)(2)(F). There are two serious misinterpretations of section 304(f)(2)(F) in attempting to use this to provide a new exemption under the Act for nonpoint sources.

First, they read section 304(f)(2)(F) as dealing with nonpoint sources of pollution. Section 304(f) requires EPA to identify and evaluate and develop guidelines for two concerns:

> "(1). . . the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures and methods to control pollution resulting from, (subsections (A) through (F))." The listed activities in subsections (A) through (F) of 304(f)(2) are not listed under nonpoint sources of pollutants in section 304(f)(1), but as a separate category of sources of pollution under section 304(f)(2)." *Id.*

The clear purpose of Congress is to separate the nonpoint sources of pollutants under section 304(f)(1) from other sources of pollutants such as agricultural, mining, construction, salt water intrusion, and changes in movement, flow or circulation of navigable waters, under section 304(f)(2), by numbering them separately.

Looking at section 304(f)(2) as a whole this is the only way it makes sense. If section 304(f)(2) were interpreted as being included within the section 304(f)(1) nonpoint source category, then all the activities defined in sections 304(f)(2)(A) through (E), as well as (F), would also be nonpoint sources of pollutants, in addition to section 304(f)(2)(F). This the EPA cannot accept. EPA regulations expressly require an NPDES permit for point source discharges for many of the activities listed in section 304(f)(2), including, under section

304(f)(2)(A), agricultural activities involving concentrated animal feeding operations, regulated at 40 CFR 122.23; mining activities, section 304(f)(2)(B), regulated at 40 CFR 122.26(a)(1)(ii), (b)(14)(iii); and construction activities, under section 304(f)(2)(c), regulated at 40 CFR 122.26(a)(9)(i), (b)(14)(x), (b)(15)(i), 122.34(b)(i).

A statute's plain meaning must be enforced. The Supreme Court has stressed, "over and over," that in construing the language of a statute the court must not be guided by a single sentence, but must be guided by the provisions of the whole law. *United States v. Heirs of Boisdore*, 49 U.S. 113 (1849). The only way to read section 304(f)(2) is to separate it from the nonpoint source section in 304(f)(1).

Another fundamental flaw with the EPA interpretation of section 304(f) is the assumption that section 304(f)(2)(F) is about the changes in movement, flow, or circulation **from one navigable water to another**. It is not. There is no mention of a transfer, connection or discharge of the movement of water from one water body to another under section 304(f)(2)(F). The only way to read this section, in light of the statute as a whole, is to recognize that it is deals with pollution from changes in movement, flow or circulation **within** the navigable waters that the changes are taking place in. When the pollution from these changes is then discharged through a point source into navigable waters it meets the definition of a "discharge of pollutants" at CWA section 502(12), 33 U.SC. § 1362(12).

C. The Inquiry Must Be Whether There Is A Discharge Of Pollutants.

Even assuming that section 304(f)(2)(F) could be read to establish Congress' intent to treat "changes in the movement, flow, or circulation of any navigable waters..." as nonpoint sources, and as including the movement from one navigable water to another, it still does not establish Congress' intent to separate those movements from consideration as point source discharges.

The EPA argues that discharges from changes in

movement in flow should be treated as nonpoint sources based on the terms of section 304(f)(2)(F), rather than a point source under section 402(a), as defined at section 502(14) of the CWA. Looking at the relevant language of these two provisions of the CWA it is striking how similar they are to one another. Under section 304(f)(2)(F), the language reads, "changes in movement, flow and circulation of navigable waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." The definition of a point source under CWA 502(14), 33 U.S.C. § 1362(14) is a "discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft..." This definition would clearly include the channels, causeways or flow diversion facilities under section 304(f)(2) (F).

The basic difference between these two provisions of the CWA is the phrase in the definition of "point source" that states: "from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The only way to determine if an activity that could be either a "change in movement, flow or circulation of any navigable water..." under section 304(f)(2)(F), or a point source discharge as defined in section 502(14), is to **determine if there is or might be a discharge of pollutants** as a result of that discharge activity into our nation's waters.

The Supreme Court, in *Miccosukee,* supports this conclusion by stating, "That (point source) definition makes plain that a **point source** need not be the original source of pollutant; it **need only convey the pollutant to "navigable waters,"** which are, in turn, defined as "the waters of the United States". 541 U.S. at 105. Determining if the point source conveys pollutants is thus the critical inquiry.

If the movement, flow or circulation of any navigable water contains pollutants, and is discharged from a point source that causes the addition of pollutants to the navigable water being discharged into, it requires a NPDES permit.

D. The August 5, 2005 EPA Interpretation Merits No Deference

The United States EPA Interpretation of August 5, 2005 cited by the Petitioner in this case beginning at page 22 of the Brief, was submitted to the Federal District Court for the Southern District of Florida on that same date, August 5, 2005. It was submitted in support of the United States' Motion For Summary Judgment, as an Intervenor Defendant in the case of of *Friends of the Everglades v. South Florida Water Management District*, Case No.02-80309. The Friends of the Everglades made the following argument to the Southern District Court on the EPA Interpretation:

> The EPA Interpretation that was submitted to the Court is not entitled to deference under *Chevron v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). The interpretation has not been the subject of rule making, with the "fruits" of notice and comment; nor has it gone through any adjudication process before the agency. *U.S. v. Mead Corp.* 533 U.S. 218, 226 (2001). Under these circumstances deference as a matter of law under *Chevron* is not warranted.
>
> Even though EPA is not entitled to deference as a matter of law, under the direction of the Supreme Court in *Skidmore v. Swift & Co.* 323 U.S. 134 (1944), the court must look to see if some level of persuasiveness should be accorded to it. *Id.* at 139.

The interpretation offered by EPA in this case runs contrary to Congress' purpose and intent in passing the Federal Clean Water Act (CWA), as well as the specific provisions of the CWA; and is contrary to the determinations of the United States Supreme Court, as set forth more fully below, and cannot be given any deference.

In *Skidmore* the weight given to an agency interpretation should depend on the thoroughness evident in the consideration, the validity of the reasoning, and consistency with earlier pronouncements. Id. at 140. Even assuming it was not contrary to the CWA's clear purpose and provisions, the reasoning in the EPA Interpretation is not valid. It is not based on a thorough evaluation of the Act, but on selective portions of the CWA taken out of context with the purpose of the Act in order to allege that there are ambiguities within the provisions of the CWA when in fact there are not. The EPA Interpretation is divisive and not supported by the unambiguous terms of the Act. As a result, this Court cannot give any deference or weight to the EPA Interpretation.

Specifically, the EPA Interpretation states that water transfers, that is, any activity that conveys or connects navigable waters without subjecting the water to intervening industrial, municipal or commercial use, is exempt from NPDES requirements, (EPA Interpretation Memorandum), except for water transfer activities that had previously been determined to require NPDES requirements, (as set forth in Section VI of the Interpretation).

Under the doctrine of deference adopted by the Supreme Court in *Chevron* the first question to ask in determining whether to give credence to an agency statutory interpretation is whether the intent of Congress is clear within the terms of the statute; if the statute is silent or ambiguous with respect to a specific issue, then one must ask whether the agency's interpretation is based on a permissible construction of the statute. 467 U.S. at 842-43.

The starting point for statutory interpretation is the language of the statute itself. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The first step "is to determine whether the language at issue has a clear and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Id.* That is the case here.

The language of the CWA clearly demonstrates that Congress intended that any discharge of any pollutant from any point source into our nation's waters is to be regulated under the NPDES program set forth in the CWA.

There is no ambiguity within the language of the Clean Water Act which could enable the EPA to restrict the scope of the NPDES permit program to exclude from regulation every conveyance not subject to intervening industrial, municipal or commercial uses, (except those the EPA has already included).

The CWA is a comprehensive act of Congress, passed in 1972, amended in 1977 and again in 1987, with Congress' specific objective to restore and maintain the chemical, physical and biological integrity of the Nation's waters. CWA §101(a), 33 USC §1251(a).

The core of the CWA is the Congressional prohibition that, "Except in compliance with this (Act), the discharge of any pollutant by any person shall be unlawful," CWA §301(a), 33 USC §1311(a). There is no ambiguity in the inclusive language of this section. Any discharge of any pollutant is covered by the prohibition.

To make it even more clear Congress defined the term, "discharge of a pollutant" as, "any addition of any pollutant to navigable waters from any point source." CWA §502(12), 33 USC § 1362(12). There are no exclusions or other limitations provided by Congress in defining what was meant to be included in the general prohibition under section 301(a).

Exemptions from the requirements of the CWA can only be established through the legislative process, not by agency interpretation, nor by agency regulation. The CWA requires that any discharge of pollutants through a point source into our nation's waters be regulated by the NPDES provisions of the CWA, section 402(a), unless the activity does not come within the parameters of the definitions Congress has established to implement its purposes and goals.

Congress has provided specific exemptions from NPDES requirements in the CWA. Section 502(14), 33 USC § 1362(14), the definition of "point source," exempts "agricultural stormwater discharges and return flows from

irrigated agriculture" from the definition. If Congress wanted to exempt from point sources all conveyances from one navigable water to another it would have done so. A fundamental principle of statutory construction, *expressio unius est exclusio alterius,* holds that express inclusion of one item implies the intent to exclude other items not included. *Edward Christensen, et. at., v. Harris County, et. al,* 529 U.S. 576, 582-83 (2000).

Congress has also provided two specific exemptions under the definition of the term pollutant: sewage from vessels or a discharge incidental to the normal operation of a vessel of the armed forces; and water, gas, or other material which is injected into a well to facilitate production of oil, gas or water derived in association with oil or gas production, and disposed of in a well, if the well is approved by the state. CWA §502(6), 33 U.S.C. § 1362(6). Congress could have extended the exceptions to include pollutants from one navigable water body to another. It did not. *Expressio unius est exclusio alterius.*

EPA is attempting to add a major new exemption through its Interpretation, where Congress has limited exemptions to the Act by legislative amendment. Congress did not provide EPA with any specific authority under the CWA to exempt any category of dischargers by regulation, much less to limit the extent of the CWA by interpretation.

The whole concept of the CWA is to restore and maintain the chemical, physical and biological integrity of our nation's waters. One of the Congressional goals of the CWA is to eliminate the discharge of pollutants into navigable waters. The purpose of the CWA, to restore the integrity of our nations waters, cannot be given any credence if EPA can categorically exempt all conveyances from one water to another unless subjected to industrial, municipal or commercial use. The CWA would become an Act to regulate industrial and municipal treatment systems, not an act to clean and restore our nation's waters, if NPDES permits were limited to the EPA Interpretation.

Congress' intent in enacting the 1972 Clean Water Act Amendments was clearly to establish an all-encompassing

program of water pollution regulations. Rep. No. 92-414, at 95, 2 Leg. Hist.1511. As the Supreme Court stated, the 1972 Amendments established "a comprehensive program for controlling and abating water pollution." *Milwaukee v. Illinois*, 451 U.S. 304 (1981).

In *Milwaukee*, the Supreme Court concluded that, "**Every** point source discharge is meant to be prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *Id.* at 318. (Emphasis added.)

In the case of *EPA v. California ex rel. State Water Resources Control Board ("EPA v. California")*, 426 U.S. 200 (1976), the Supreme Court dealt with the history of what prompted the 1972 Amendments, beginning with the fact that the federal water pollution program up to that time was "inadequate in every vital aspect." Citing S. Rep. 92-414, Id. at 202-03.

The Supreme Court recognized that the 1972 Amendment introduced two major changes in the methods of setting and enforcing standards to abate and control water pollution. "First, the Amendments are aimed at achieving maximum 'effluent limitations' on 'point sources,' as well as achieving acceptable water quality standards." *EPA v. California*, 426 U.S. at 205. "Second, the amendments established the National Pollutant Discharge Elimination System (NPDES) as a means of achieving and enforcing the effluent limitations." *Id.* at 205.

The purpose of the major changes was to deal with the problem of enforcement inherent in the prior cumbersome enforcement procedures. The prior procedures employed ambient water quality standards which specified acceptable levels of pollution in the navigable waters, rather than applying the specified acceptable levels at the source of the discharge into the water. As the Supreme Court stated in *EPA v. California*, "Such direct restrictions on discharges facilitate enforcement by making it necessary to work backward from an over-polluted body of water to determine which point sources are responsible and which must be abated." *Id.* at 204.

Under the CWA definition of the term "discharge of a pollutant," the focus of determining whether the CWA restriction under section 301 applies is to look "**to**" the receiving body of water, and determine if there are "**any**" pollutants being added to the receiving water from "**any**" point source. The meaning of the terms "any" and "to" are unambiguous. "Any" means "every or all, in relation to which pollutants and which point sources." Webster's New Century Dictionary (2001). "To" means simply "motion or direction toward a point, person, place or thing," not "from." *Id.*

In order for the EPA/DOJ tp create this broad new exemption of water transfers from the NPDES program the EPA has to draw assumptions and inferences from peripheral sections of the CWA, employing subjective "interpretations" of what these sections mean collectively, not within the language of these sections themselves. That is why the DOJ repeatedly uses the phrase relating to the CWA, "**when read as a whole,**" relying on sections 101(g), 510(2), and 304(f)(2)(F), to create their argument. (EPA Interpretation Memorandum).

The EPA Interpretation, relied on by the DOJ, defines a water transfer as, "any activity that conveys or connects navigable waters without subjecting the water to intervening industrial, municipal or commercial uses." (EPA Interpretation Memorandum). Not only is this definition contrary to the Supreme Court Determination in *Miccosukee,* that "the definition of a **point source** need not be the original source of the pollutant; it **need only convey the pollutant to 'navigable waters,'** which are, in turn, defined as 'the waters of the United States.'" 541 U.S. at 105(Emphasis added); It also creates a definition completely outside the scope of and without the support of the CWA.

Nowhere in the sections relied on by EPA and DOJ, or anywhere in the CWA, is the term "water transfer" used, identified or defined. Nowhere in the CWA is the phrase "conveys or connects navigable waters" identified or defined. Neither are the terms "convey" or "connect" independently used in any of the sections of the CWA relied on by the Intevenor Defendant. Without the use of the term "connect" the

definition would not work.

Nor does the CWA mention or define what the term "subjecting the water to intervening..." uses means. The EPA Interpretation gives no guidance. The CWA does define the term "industrial user" at section 502(18), 33 U.S.C. § 1362(18), and the term "municipality" in 502(4), 33 U.S.C. § 1362(4), which gives some insight into what industrial and municipal uses might mean but these terms are not used in the provisions of the CWA relied on by the DOJ to limit the scope of the Congressional intent to prohibit discharges of pollutants to be related only to industrial, municipal or commercial uses.

There is thus no authority in the CWA to support the use of the term "water transfer" and its created definition to define or limit any activity which discharges pollutants into navigable waters from being regulated under the NPDES program.

E. Nonpoint Sources Are Not Exempt From Point Source Provisions Of The CWA.

The next problem with the DOJ argument that water transfers are exempt from NPDES permitting is that the principle provisions of the CWA must be ignored to reach that desired conclusion. To accomplish the task of avoiding review under the point source provisions of the CWA, the DOJ states, "Looking to the statute as a whole reveals that a fact-specific inquiry into every water transfer is legally irrelevant." (EPA Interpretation Memorandum).

The DOJ argument, although not clearly articulated, is that as a matter of law, if there is water transfer activity it is de facto a nonpoint source under section 304(f)(2)(F). If it is a nonpoint source it cannot be a point source according to the DOJ. Therefore, the analysis as to whether or not that activity is subject to the point source provisions of an NPDES permit should not be made. The United States Supreme Court disagrees. In *Miccosukee,* the Supreme Court stated that, "We note, however, that section 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES permit

program if they also fall within the 'point source' definition." 541 U.S. at 106.

The DOJ argument of exemption of all non-industrial, municipal, commercial use point source discharges as nonpoint source is based on a misguided attempt to restore states' control over water quality responsibilities that Congress removed from them in the 1972 CWA. See 451 U.S. at 310; 426 U.S. at 202-03.

This is clearly contrary to the intent of the CWA to restore and maintain the chemical, physical and biological integrity of our nation's waters; and to establish as a national goal the elimination of the discharge of pollutants into our nation's waters. CWA sections 101(a) and 101(a)(1). It is also contrary to the United States Supreme Court view of the scope of the CWA, which is that "every point source discharge is meant to be prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *Milwaukee* 451 U.S. at 318; *EPA v. California ex rel. State Water resources Board,* 426 U.S. at 200; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* 452 U.S. 264, 282 (1981)(finding that the CWA is a paradigm of environmental regulation, and is an "accepted exercise of federal power").

The provisions of the CWA that are relied upon by the DOJ, as well as the South Florida Water Management District, in attempting to redefine the CWA, are peripheral to and not supportive of the primary goal of the CWA to restore our nation's waters.

The goal of the CWA to maintain the water allocation rights of states contained in section 101(g) of the CWA merely reaffirms those existing rights and does not conflict with federal regulation of water quality point source discharges. Both the Supreme Court and Congress have made this clear. Sections 101(g) and 510(2) preserve the authority of each state to allocate water quantity between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained permits pursuant to a state permit, a water allocation permit. *PUD No. 1 of Jefferson County et. al. v.*

Washington Department of Ecology et. al., 511 U.S. 700, 720 (1994). In the Legislative History of the CWA, 1977 Amendments, when section 101(g) was added, it was stated, "The requirements [of the CWA] may incidentally affect individual water rights . . . It is not the purpose of this Amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that state allocation systems are not subverted, and that effects in individual rights, if any, are prompted by legitimate and necessary water quality considerations." Ser. No. 95-14, p. 532, at 721 (1978).

The remaining provision relied upon by DOJ, section 304(f), sets out the requirements to provide guidelines to the states for identifying and evaluating the nature and extent of two sources of activities. The first, in section 304(f)(1), is nonpoint sources of pollutants. The second is for processes, procedures and methods to control pollution resulting from agricultural, mining, construction activities and salt intrusion, as well as changes in movement of waters. CWA § 304(f)(2), 33 U.S.C. § 1314(f)(2). These guidelines are also supplemental to the primary purpose of the CWA to restore the water quality of our nation's waters through control of point sources of pollutants.

As the Tenth Circuit Court of Appeals determined, nowhere in section 304(f) does it exempt the permit requirement for point source discharges. The Tenth Circuit held that the provision does not create nonpoint exemptions from the CWA's NPDES requirement, stating "mining and other categories listed in section 1314(f)(2) may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation." *United States v. Earth Sciences, Inc.* 599 F.2d 368, 373 (10th Cir. 1979). This decision was the result of an EPA enforcement action.

The **DOJ's** repeated assertions that their concept of an exemption for water transfers from NPDES permitting is the **holistic view of the CWA**, "which gives due consideration to all of the relevant provisions and goals," and is a view of the "CWA read as a whole," **is a sham**. (EPA Interpretation Memorandum).

F. There Is No Distinction Between Pollution And Pollutants.

The DOJ alludes, and the WMD directly argues, that the CWA draws a clear distinction between the term "pollution" and the term "pollutant," implying that pollution is a term dealing with nonpoint sources under the CWA, and pollutant with point sources under the CWA. (EPA Interpretation Memorandum). This distinction simply makes no sense.

The CWA does not distinguish between the terms "pollution" and "pollutant." The CWA does not segregate problems with pollution from nonpoint sources and problems with pollutants from point sources. The very section of the CWA relied upon by the Defendants to establish the assumption that Congress establishes a separate category of nonpoint sources of pollution, section 304(f)(2)(F), does not even refer to nonpoint sources. But section 304(f)(1) does, and it refers to developing guidelines for identifying nonpoint sources of **pollutants**, not pollution.

The definitions of pollutants and pollution are quite related. The term pollution means the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water. CWA § 502(19), 33 U.S.C. § 1362(19). These are the same terms as are stated in the primary goal of the CWA at 101(a), 33 U.S.C. § 1251(a). These terms are also reflected within the definition of "pollutant" at CWA 502(6), which includes "chemical wastes," "biological materials," "radioactive materials," and lots of physical materials, including, dredged spoil, solid waste, rock, sand, cellar dirt, as well as industrial, municipal and agricultural waste.

There is no reason within the goals and provisions of the CWA to try to make these two terms separate and distinct. A general principle of statutory construction is that courts are "required ... to interpret one statutory term in a manner that will not conflict with other terms." *Oil, Chemical & Atomic Workers Int'l v. RMI Titanium Co.* 199 F.3d 881, 894 (6th Cir.

2000).

If "pollution" as defined in the CWA is considered only in relation to nonpoint sources, then any discharge of "man-made or man-induced alterations of the chemical, physical, biological and radiological integrity of water" would be exempted as a point source. It would be impossible to separate point sources of pollutants of chemical, physical, biological and radiological wastes from the discharge of man-made alteration of the same materials.

CONCLUSION

S.D. Warren's Brief misinterprets this Court's Opinion in the case of *South Florida Water Management District v. Miccosukee Tribe of Indians,* 541 U.S. 95 (2004).
The reliance of the Petitioner, as well as the EPA and the D.C. and Sixth Circuit Courts of Appeal in the "Dam" cases, and the EPA in its August 5, 2005 Interpretation on section 304(f)(2)(F) as a statutory exemption for nonpoint sources is contrary to the plain meaning and intent of that section. Further, Warren's reliance on the EPA August 5, 2005 Interpretation is inappropriate, as the Interpretation is contrary to the terms and conditions of the Federal Clean Water Act, and this Court's numerous interpretations of relevant portions of that Act.

For the foregoing reasons, *Amicus* respectfully urges the Court to affirm the lower court's decision regarding Maine's decision to require 401 Certification conditions to the discharges of the Petitioner S.D. Warren's dams on the Presumpscot River in Maine.

Respectfully submitted,

John E. Childe
Counsel of Record
For Friends of the Everglades
606 Pine Road
Palmyra, Pennsylvania 17078
717-520-1510

No. 02-626

IN THE

Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA
And FRIENDS OF THE EVERGLADES, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR REHEARING

DEXTER W. LEHTINEN
Counsel of Record
JUAN M. VARGAS
CLAUDIO RIEDI
LEHTINEN, VARGAS
& RIEDI, P.A
7700 North Kendall Drive
Suite 303
Miami, FL 33156-7559
(305) 279-1166

SONIA ESCOBIO O'DONNELL
RICHARD J. OVELMAN
ENRIQUE D. ARANA
TODD M. FULLER
JORDEN BURT LLP
777 Brickell Avenue
Suite 500
Miami, FL 33131

DIONÈ C. CARROLL
In House General Counsel
MICCOSUKEE TRIBE OF INDIANS
OF FLORIDA
P.O. Box 440021
Tamiami Station
Miami, FL 33144

Counsel for Respondent
Miccosukee Tribe of Indians of Florida

STATEMENT

Pursuant to Sup. Ct. R. 44, the Tribe requests rehearing to correct statements in the Opinion which inaccurately state the Tribe's position in this appeal, and which, if left uncorrected, could cause confusion on remand.[1] The corrections are necessary not only to reflect the clear record before the Court regarding the Tribe's long standing positions — before the district court, before the circuit court and in its brief and argument to this Court — but also because they clarify the hydrological relation between these two distinct surface water bodies. Rehearing is proper because the portion of the Opinion that was remanded contains misconceptions of fact.

1. The Opinion Should Be Corrected To Reflect That The Tribe Does Argue That a Permit Would Be Required Even If the WCA-3 And The C-11 Are Determined To Be Two Parts Of The Same Water Body.

The Opinion states: "The Tribe does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute and an 'addition' of pollutants." *South Florida Water Management District ("SFWMD") v. Miccosukee Tribe of Indians, et al.*, 124 S. Ct. 1537, 1545 (2004). This is incorrect.

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1. The Tribe fully recognizes that rehearing petitions are granted only rarely and that they are not a vehicle for rearguing a case the Court has taken great care in deciding. *See* Sup. Ct. R. 44. Nevertheless, the Tribe understands that the Court will make changes "to correct certain inaccuracies or omissions brought to light by a petition for rehearing...." Robert L. Stern, *et al.*, Supreme Court Practice 729 (8th ed. 2002) (collecting cases). The Tribe respectfully submits that the Court should grant rehearing in this case for the limited purpose of the correcting two material inaccuracies in the Opinion regarding the Tribe's positions in this appeal.

At oral argument, the Tribe's counsel argued that permits would be required even if the WCA-3 and the C-11 were found to be the same body of water:

> QUESTION: ...do you think that if it — if— if it is established that — that this is the same water body, these pumps would be ok without permitting.
>
> MR. LEHTINEN: No, your honor, because...
>
> QUESTION: I thought so...

(Tr. at 37)

* * *

> QUESTION: But you say this doesn't matter anyway. You wouldn't care if it was the same water body. That isn't — that isn't what you are arguing.
>
> MR. LEHTINEN: We do argue that [if] it is the same water body and you pump it substantially upstream. You would also need a permit.
>
> QUESTION: Right, right.

(Tr. at 43.44).

Relying on *Dubois v. United States Department of Agriculture,* 102 F.3d 1273 (1st Cir. 1992), the Tribe's counsel explained that whether the WCA-3 and the C-11 are considered to be one body of water (i.e, hydrologically connected) or not is irrelevant because water from the C-11 naturally flows in an easterly direction — away from WCA-3.
(Tr. at 37-38). As the *Dubois* Court explained:

> The [] 'hydrological connectedness' proposal ignores a fundamental fact about water: the direction of flow.

> It is true that Loon Pond and the East Branch of the Pemigewasset River are "hyrdrologically connected" in the sense that water from the pond flows *down* and eventually empties into the River. But water from the East Branch certainly does not flow *uphill* into Loon Pond, carrying with it the pollutants that have undisputedly accumulated in the East Branch water from some of the other sources of water entering the East Breach from upstream. Under such circumstances, defendants cannot credibly argue that these water bodies are so related that the transfer of water *from* the East Branch *to* Loon Pond is not an "addition"" of water from one of the "waters of the United States" to another.

Dubois, 102 F.3d at 1298.

In its brief, the Tribe consistently argued that permits were required because "the S-9 pump station reverses the natural flow, backpumps 'against a gradient' or 'against what would flow naturally the other direction, or another direction,' the polluted water to the west, where it would not have flowed otherwise." (Resp. Br. at 8); (*see also* Resp. Br. at 12, 17 & 24); (*see also* Br. of Friends of the Everglades at 5 & 13). Accordingly, the Tribe did not, and has never, conceded that permits would not be required if it is determined that the C-11 and the WCA-3 are one, interconnected, body of water. The Court should correct the Opinion so that there is no confusion on remand.[2]

---

2. The Court also states in *dicta* that:

> After reviewing the full record, it is possible that the District Court will conclude that C-11 and WCA-3 are not meaningfully distinct water bodies. If it does so, then the S-9 pump station will not need NPDES permit.

(Cont'd)

2. The Decision Should Be Corrected To Reflect That The Tribe Does Defend The Decisions Of The Lower Courts That The C-11 And The WCA-3 Are Distinct Because The Transfer Ff Water From The C-11 Into The WCA-3 Would Not Occur But For The S-9 Pump.

The Opinion also states that the district court applied a test for determining whether the C-11 and the WCA-3 are distinct water bodies which "neither party defends; it determined that C-11 and WCA-3 are distinct 'because the transfer of water or its contents from C-11 into the Everglades would not occur naturally.'" *SFWMD*, 124 S.Ct. at 1546. This statement is mistaken with respect to the Tribe's position.

The Tribe vigorously defends the district court's view that a permit is required because the transfer of surface water pollutants from the C-11 to the WCA-3 would not occur naturally. (Resp. Br. at 8, 12, 17 & 24); (*see also* Br. of Friends of the Everglades at 5 & 13). The Tribe did not otherwise explicitly defend the district court's application of this test

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(Cont'd)
SFWMD, 124 S. Ct. at 1547. To the extent this *dicta* was predicated on the Opinion's statement that the Tribe concedes that no permits would be required if the C-11 and WCA-3 are the same body of water, this language should be corrected because there was no such concession. Whether or not predicated on that assumption, the *dicta* should be corrected because it is confusing. Backpumping and discharging surface water containing pollutants from downstream sources into pristine areas upstream would require a permit even if the stream is the same hydrologically because it would involve the discharge of pollutants. Although the Court recognized this difference by using the term "meaningfully distinct" water bodies and "cause in fact," the *dicta* does not expressly set forth the criteria for establishing the "same body of water" test.

for distinguishing the two water bodies because the District simply did not challenge that test in its Petition to this Court. (*See* Pet. Br. at 46-49). Indeed, it would have been futile for the District to do so because the undisputed record evidence is that, absent the operation of the S-9 pumps, water from the C-11 would not naturally enter the Everglades Water Conservation Area:

> Water in the C-11 canal could occasionally, under extreme hydrologic conditions, flow from east to west. However, it would *not naturally* enter the Everglades Protection Area without operation of the S-9 pump station.

(J.A. at 193) (emphasis added). As the Eleventh Circuit explained, "[n]either party disputes that, without the operation of the S-9 pump station, the polluted waters from the C-11 Canal would not normally flow [west] into the WCA-3A." (Petition at 8a).[3]

CONCLUSION

For the foregoing reasons, this Court should grant rehearing.

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3. The Tribe clearly stated in its brief that the lower courts

> correctly found that the Petitioner's discharge of pollutants from the large pipes of the S-9 pump station was not a remote 'but for' cause of the pollutants reaching the Everglades Protection Area but instead it was the most immediate cause of the pollutants entering that area and as such constituted an 'addition'.

(Tribe's Br. At 24); (*see also* Br. of Friends of the Everglades at 9).

Respectfully submitted,

DEXTER W. LEHTINEN
Counsel of Record
JUAN M. VARGAS
CLAUDIO RIEDI
LEHTINEN, VARGAS
& RIEDI, P.A
7700 North Kendall Drive
Suite 303
Miami, FL 33156-7559
(305) 279-1166

SONIA ESCOBIO O'DONNELL
RICHARD J. OVELMAN
ENRIQUE D. ARANA
TODD M. FULLER
JORDEN BURT LLP
777 Brickell Avenue
Suite 500
Miami, FL 33131

DIONÈ C. CARROLL
In House General Counsel
MICCOSUKEE TRIBE OF INDIANS
P.O. Box 440021
Tamiami Station
Miami, FL 33144

Counsel for Respondent
Miccosukee Tribe of Indians of Florida

CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.1 of the Rules of the Supreme Court and is presented in good faith and not for delay.

DEXTER W. LEHTINEN

Supreme Court, U.S.
FILED
JAN 5 2006
OFFICE OF THE CLERK

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No. 04-1527

IN THE
Supreme Court of the United States

S.D. WARREN COMPANY,
Petitioner,

v.

MAINE DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Respondent

On Writ of Certiorari to the
Maine Supreme Judicial Court

BRIEF OF *AMICI CURIAE* HOOPA VALLEY TRIBE, KLAMATH TRIBES OF OREGON, LUMMI NATION, AND THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON ON BEHALF OF RESPONDENT MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION

THOMAS P. SCHLOSSER*
THANE D. SOMERVILLE
*Counsel of Record
MORISSET, SCHLOSSER, JOZWIAK
& MCGAW
801 Second Ave., Ste. 1115
Seattle, WA 98104-1509
(206) 386-5200
Counsel for Amicus Curiae Hoopa Valley Tribe
(Add'l counsel listed on signature page)

TABLE OF CONTENTS

INTERESTS OF THE AMICI CURIAE 2

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. THE WATER QUALITY CERTIFICATION PROCESS IN SECTION 401 PROVIDES A CRITICAL TOOL FOR THE PROTECTION OF TRIBAL WATERS FROM THE ADVERSE IMPACTS OF FEDERALLY LICENSED DAMS. 9

II. FEDERALLY LICENSED DAMS HAVE SIGNIFICANT IMPACTS ON WATER QUALITY AND THE PROPERTY RIGHTS OF INDIAN TRIBES SUCH AS AMICI CURIAE 13

III. HYDROELECTRIC DAM OPERATIONS RESULT IN A DISCHARGE AND ARE PROPERLY SUBJECT TO THE WATER QUALITY CERTIFICATION AUTHORITY IN SECTION 401. 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Alabama Rivers Alliance v. FERC,
325 F.3d 290 (D.C. Cir. 2003) 19
Arkansas v. Oklahoma,
503 U.S. 91 (1992) 11
Blake v. Arnett,
663 F.2d 906 (9th Cir. 1981) 2
Bugenig v. Hoopa Valley Tribe,
266 F.3d 1201 (9th Cir. 2001) (*en banc*), *cert. denied*,
535 U.S. 927 (2002) 3
Chemehuvi Indian Tribe v. California State Bd. of Equalization,
757 F.2d 1047 (9th Cir. 1985), *rev'd on other grounds*,
474 U.S. 9 (1985) 18
City of Albuquerque v. Browner,
97 F.3d 415 (10th Cir. 1996) 10, 11
Helvering v. Morgan's Inc.,
293 U.S. 121 (1934) 18
In re City of Fort Smith,
42 F.E.R.C. ¶ 61,362 (1988), *on reh'g*
44 F.E.R.C. ¶ 61,160 (1988), *aff'd*,
912 F.2d 1471 (D.C. Cir. 1990) 19
Kandra v. United States,
145 F.Supp.2d 1192 (D. Or. 2001) 4
National Wildlife Fed'n v. FERC,
912 F.2d 1471 (D.C. Cir. 1990) 19
Northwest Sea Farms v. U.S. Army Corps of Engineers,
931 F.Supp. 1515 (W.D.Wash. 1996) 6
Oregon Natural Desert Ass'n v. Dombeck,
172 F.3d 1092, *cert. denied*,
528 U.S. 964 (1999) 6, 18

Pacific Coast Federation of Fishermen's Associations v. United States Bureau of Reclamation,
426 F.3d 1082 (9th Cir. 2005) 15
Parravano v. Babbitt,
70 F.3d 539 (9th Cir. 1995), *cert. denied*,
518 U.S. 1016 (1996) 2, 6
PUD No. 1 of Jefferson County v. Washington Dep't of Ecology,
511 U.S. 700 (1994) 18, 19
State of North Carolina v. FERC,
112 F.3d 1175 (D.C. Cir. 1997) 19
United States v. Adair,
723 F.2d 1394 (9th Cir.), *cert. denied*,
444 U.S. 1252 (1984) 2, 3
United States v. Anderson,
591 F.Supp. 1 (E.D. Wash. 1982), *aff'd in part & rev'd in part on other grounds*,
736 F.2d 1358 (9th Cir. 1984) 2
United States v. Oregon,
657 F.2d 1009 (9th Cir. 1981) 6
United States v. Washington,
384 F.Supp 312 (W.D. Wash. 1974), *aff'd*,
520 F.2d 676 (9th Cir. 1975), *cert. denied*,
423 U.S. 1086 (1976) 5
United States v. Winans,
198 U.S. 371 (1905) 2
United States. v. Eberhardt,
789 F.2d 1354 (9th Cir. 1986) 2
Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,
443 U.S. 658 (1979) 6
Wisconsin v. EPA,
266 F.3d 741 (7th Cir. 2001) 9, 11, 12

Statutes

Clean Water Act, 33 U.S.C. § 1251 ..... 1, 12, 17
33 U.S.C. § 1313 ..... 6, 10
33 U.S.C. § 1341 ..... 1, 6, 8, 9, 11, 14, 20
33 U.S.C. § 1342 20
33 U.S.C. § 1362(19) 7, 17
Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987), *codified as amended*, at 33 U.S.C. § 1377 (2000) 3, 9, 10, 11, 13

Regulations

40 C.F.R. § 131.4(c) 9
40 C.F.R. § 131.5 ..... 11, 13
40 C.F.R. § 131.7 ..... 9, 12, 13
40 C.F.R. § 131.8(b) 10
40 C.F.R. §§ 121.11-121.16 ..... 9, 11

Other Authorities

53 Fed. Reg. 27,130 (July 18, 1988) 4
Alia S. Miles, *Searching for the Definition of "Discharge": Section 401 Of The Clean Water Act*, 28 ENVTL L. 191, 212 (1998) 17
Alison M. Dornsife, *From A NonPollutant Into A Pollutant: Revising EPA's Interpretation Of The Phrase "Discharge Of Any Pollutant" In The Context Of NPDES Permits*, 35 ENVTL L. 175, 177 (2005) 16
Anne E. Tweedy, *Using Plenary Power As A Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After United States v. Lara*, 35 ENVTL L. 471 (2005) 13
California Energy Commission Staff Report, *California Hydropower System: Energy and Environment Appendix D* (October 2003), at p. D-19, available at http://www.energy.ca.gov/reports/2003-10-30_100-03-018.PDF 16

David F. Coursen, *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Laws and Regulations*, 23 ENVT. L. REP. 10579 (1993) 13

Federal Energy Regulatory Commission, Klamath Hydroelectric Project (FERC Project No. 2082), *PacifiCorp Response to FERC Additional Information Request dated February 17, 2005: AR-2*, available at http://www.ferc.gov (FERC e-library accession number 20051017-5019, AR2AppendixBPlotsOct2005.PDF 5

Independent Multidisciplinary Science Team, *IMST Review of the USFWS and NMFS 2001 Biological Opinions on Management of the Klamath Reclamation Project and Related Reports*. Technical Report 2003-1 to the Oregon Plan for Salmon and Watersheds, Oregon Watershed Enhancement Board, Salem, Oregon, available at http://www.fsl.orst.edu/imst/reports/klamath.html 4

State of Oregon Department of Environmental Quality posted Section 401 Water Quality Certification documents for the "Pelton Round Butte Hydroelectric Project (FERC Project No. 2030)" at http://www.deq.state.or.us/wq/401Cert/401CertHome.htm 7

Supreme Court Rule 37(3)(a) 1

Supreme Court Rule 37(6) 1

THE HOOPA VALLEY TRIBE CONSTITUTION, Art. IX, Sec. 1(e) 2

WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 360 (1991) 18

The Hoopa Valley Tribe, Klamath Tribes of Oregon, Lummi Nation, and the Confederated Tribes of the Warm Springs Reservation of Oregon (the "Tribes") submit this *amici curiae* brief on behalf of the Respondent Maine Department of Environmental Protection seeking to affirm the judgment of the Maine Supreme Judicial Court. This brief emphasizes the unique interest of fishery-dependent tribal cultures in water quality protection, and the role that Indian tribes play under the Clean Water Act, 33 U.S.C. § 1251, *et. seq.*, and specifically Section 401, 33 U.S.C. § 1341, to ensure federally licensed activities, including dams, do not contribute to violations of EPA-approved tribal water quality standards.

The brief also explains that many dams, such as those affecting the Tribes' reservations, cause pollution that contributes to violations of water quality standards. Limiting the authority of states and EPA-approved Indian tribes to regulate the pollution caused by dams would significantly interfere with the comprehensive and coordinated scheme of water pollution control created by Congress in the Clean Water Act and would jeopardize property rights reserved to Indian tribes in treaties and Executive Orders. Pursuant to Supreme Court Rule 37(3)(a), this brief is filed with the written consent of all parties.[1]

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[1] In compliance with Supreme Court Rule 37(6), *amici curiae* represent that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amici curiae* or their counsel, made a monetary contribution to the preparation or submission of this brief.

INTERESTS OF THE AMICI CURIAE

The Hoopa Valley Tribe is a federally recognized sovereign Indian tribe. The ancestral home of the Hoopa Valley Tribe, established as an Indian reservation in 1864, is located in northwestern California between the Coast Ranges and the Salmon-Trinity Alps Wilderness Area. The Klamath and Trinity Rivers flow through the reservation.

The Hoopa Valley Tribe's reservation includes a reserved right to the fishery resources of the Klamath River basin (which includes the Trinity River as the largest tributary of the Klamath River). *Parravano v. Babbitt*, 70 F.3d 539, 545 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996); *United States. v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986). The fishery resources of the Klamath River basin are the mainstay of the life and culture of the Indians residing there, and have been since prehistoric times. The fishery is "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)).

Protection of water quality is essential to the survival of the fishery in the Klamath River basin. The Hoopa Valley Tribe's reserved fishery right includes the right to certain conditions of water quality and flow to support all life stages of fish. *United States v. Adair*, 723 F.2d 1394, 1410 (9th Cir.), *cert. denied*, 444 U.S. 1252 (1984); *United States v. Anderson*, 591 F. Supp. 1, 5-6 (E.D. Wash. 1982), *aff'd in part & rev'd in part on other grounds*, 736 F.2d 1358 (9th Cir. 1984). The Hoopa Valley Tribe's Constitution in Art. IX, Sec. 1(e) encompasses the power to protect wildlife and natural resources. Congress ratified this constitutional

authority. *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001) (*en banc*), *cert. denied*, 535 U.S. 927 (2002).

The Hoopa Valley Tribe is authorized by the United States Environmental Protection Agency ("EPA"), pursuant to Clean Water Act Section 518, 33 U.S.C. § 1377, to establish water quality standards for the protection of water quality on the reservation. Pursuant to this authorization, and the certification authority of Section 401, the Tribe may condition federally licensed activities, including upstream dams, to avoid operations that cause or contribute to violations of EPA-approved tribal water quality standards.

Anadromous fish populations have suffered a precipitous decline in the Klamath River basin due to human caused factors that degrade habitat, alter stream flows, and pollute water, including the existence and operation of six federally licensed dams on the Klamath River (known collectively as the "Klamath Hydroelectric Project"). The owner of the Klamath Hydroelectric Project, located upstream of the Hoopa Valley Reservation, is currently seeking a new federal license from the Federal Energy Regulatory Commission ("FERC"). The continued existence of tribal and state authority to certify the Klamath Hydroelectric Project's compliance with applicable water quality standards is crucial to the health of the Klamath River and to the maintenance of the Hoopa Valley Tribe's federally reserved fishing rights over the next thirty to fifty years - the duration of a FERC license.

The Klamath Tribes of Oregon are a federally recognized tribal government, party to the Treaty of 1864 with the United States. 16 Stat. 707. The importance of tribal fisheries was well known to both the Tribes and the United States at the time of the Treaty. *Adair*, 723 F.2d

1394, 1409, n.14. The Treaty reserved to the Tribes the fisheries that were, and continue to be, of enormous importance to their physical and spiritual well-being. *Kandra v. United States*, 145 F. Supp.2d 1192, 1201 (D. Or. 2001). Today the Tribes' most important fisheries are no longer available to sustain their people, due in part to water quality problems associated with dams on the Klamath River system.

Two examples illustrate the fact that dams on the Klamath River system are not benign structures insofar as tribal water quality is concerned. First, two species of fish known as c'wam and kuptu (and called "suckers" by non-Indians) are listed as "endangered" pursuant to the Endangered Species Act; contributing factors include dams and water quality problems in Upper Klamath Lake. 53 Fed. Reg. 27,130-32 (July 18, 1988). Water quality problems are exacerbated by dams that change the retention time, flushing time, and other characteristics of Upper Klamath Lake.[2] Second, the Tribes' efforts to recover Treaty-protected salmon fisheries are made difficult by dam reservoirs that (i) increase water temperatures for many miles downstream of the hydroelectric project, which stresses salmon and shifts their migration timing to less advantageous times, (ii) decrease dissolved oxygen concentrations below the dams, further stressing migrating salmon and (iii) generate massive

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[2] Independent Multidisciplinary Science Team, *IMST Review of the USFWS and NMFS 2001 Biological Opinions on Management of the Klamath Reclamation Project and Related Reports*. Technical Report 2003-1 to the Oregon Plan for Salmon and Watersheds, Oregon Watershed Enhancement Board, Salem, Oregon, available at http://www.fsl.orst.edu/imst/reports/klamath.html.

algae blooms that release high concentrations of a toxin that compromises the ability of fish to return to their native habitat.[3]

The Lummi Nation is a federally recognized Tribe of American Indians that signed the Treaty of Point Elliott, 10 Stat. 1132 (1855). It governs the Lummi Reservation, located in the northwest corner of Washington State. The reservation is bounded on the east by the main stem and the mouth of the Nooksack River. Fishing has been central to Lummi culture, economy and diet since time immemorial. In the Treaty, Lummi reserved the right to take fish both on the reservation, and at off reservation "usual and accustomed grounds and stations." Lummi usual and accustomed fishing grounds and stations were confirmed in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), and include the marine waters of northern Puget Sound as well as the fresh waters of several rivers and streams draining into these marine waters. *Id.* at 360-61. One of the major salmon producing rivers contributing fish to the Lummi harvest is the Skagit River, upon which Seattle City Light owns and operates two hydroelectric dams. Other rivers, such as the Nooksack, have diversion dams and other obstructions that alter water quantity and quality of the free flowing stream.

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[3] Federal Energy Regulatory Commission, Klamath Hydroelectric Project (FERC Project No. 2082), *PacifiCorp Response to FERC Additional Information Request dated February 17, 2005: AR-2*, available at http://www.ferc.gov (FERC e-library accession number 20051017-5019, AR2AppendixBPlotsOct2005.PDF).

The right of taking fish includes the right to protect tribal fisheries from interference by State regulation, *e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), federal regulation, *Parravano, supra*, or direct interference with a fishing opportunity, *Northwest Sea Farms v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1996).

Lummi has filed an application under the Clean Water Act for Treatment as a State ("TAS") which is pending with the Environmental Protection Agency.

The Confederated Tribes of the Warm Springs Reservation of Oregon ("CTWS") is a federally recognized Indian tribe and party to a Treaty with the United States, 12 Stat. 963. CTWS has "exclusive use" of the Warm Springs Reservation and its treaty-reserved fishing rights also include the right to fish at the usual and accustomed stations in common with the citizens of the United States. Treaty of 1855, Art. 1. As authorized under Section 518 of the Clean Water Act, 33 USC § 1377, CTWS has adopted water quality standards under Section 303 of the Clean Water Act, 33 U.S.C. § 1313, and has obtained TAS for issuing Section 401 water quality certifications, 33 U.S.C. § 1341. CTWS is also a party to *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981), participates vigorously in co-management of the indigenous fishery throughout the Columbia River basin and was a party in *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998) (holding that "discharge" as that term is used under Section 401 of the Clean Water Act "includes all releases from point sources, whether polluting or nonpolluting"), *cert. denied*, 528 U.S. 964 (1999).

CTWS also has a pecuniary interest as an owner in the operation of federally-licensed dams. CTWS is a co-licensee with Portland General Electric of the Pelton Project which is partially located on the Reservation. During recent FERC proceedings relicensing the Pelton Project, both CTWS and the state of Oregon exercised jurisdiction under Section 401 of the Clean Water Act to issue a Section 401 Water Quality Certification.[4] The Pelton Project causes adverse water quality changes in the Pelton Project area as well as in reaches of affected waterbodies in the Deschutes River basin. These include low dissolved oxygen and water temperature changes. Accordingly, the Pelton Project's operations significantly change the natural water quality conditions and cause "pollution" as that term is defined in 33 U.S.C. § 1362(19) that affect fisheries. The certifications require mitigation actions to achieve compliance with temperature and dissolved oxygen standards.[5]

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[4] On June 24, 2002, and on June 25, 2002, the Oregon Department of Environmental Quality ("ODEQ") and CTWS, respectively, issued the Pelton Project's Section 401 Water Quality Certifications.

[5] *See* State of Oregon Department of Environmental Quality posted Section 401 Water Quality Certification documents for the "Pelton Round Butte Hydroelectric Project (FERC Project No. 2030)" at http://www.deq.state.or.us/wq/401Cert/401CertHome.htm. The Section 401 Water Quality Certifications require the Pelton Project to construct a selective water withdrawal tower at the existing turbine intake at Round Butte Dam which can be operated to blend water from the reservoir's surface and at depth when necessary to meet applicable temperature standards in the lower Deschutes River and assist in meeting dissolved oxygen standards.

SUMMARY OF ARGUMENT

The Tribes urge the Court to affirm the judgment of the Maine Supreme Judicial Court and affirm the authority provided by Clean Water Act Section 401, 33 U.S.C. § 1341, that prevents federally licensed dams from causing or contributing to violations of EPA-approved water quality standards over the objections of affected states and EPA-approved tribal governments.

The Clean Water Act provides Indian tribes with authority to regulate and protect the waters of their reservations. Once approved by EPA, Indian tribes may develop water quality standards and object to proposed federal activities, such as dams, that threaten to impair tribal waters. The water quality certification process in Section 401 provides a critical tool in the protection of tribal waters from the adverse impacts of federally licensed dams.

Federally licensed dams result in significant impacts to water quality, interfering with Indian tribes' reserved property rights to water and fish. Hydroelectric dam operations, including those that directly affect the *amici curiae*, do result in a "discharge" and are properly subject to the certification authority of Section 401. The Court should reject Appellant's strained interpretation of the term "discharge" and affirm the judgment of the Maine Supreme Judicial Court.[6]

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[6] The Maine Supreme Judicial Court's decision was limited to situations that did not involve the addition of a pollutant. However, as discussed in Part III of this brief, the absence of a pollutant does not mean there are no ill effects on water quality. The proper interpretation of "discharge"

ARGUMENT

I. THE WATER QUALITY CERTIFICATION PROCESS IN SECTION 401 PROVIDES A CRITICAL TOOL FOR THE PROTECTION OF TRIBAL WATERS FROM THE ADVERSE IMPACTS OF FEDERALLY LICENSED DAMS.

In 1987, Congress gave Indian tribes a powerful new voice in the water quality certification process under Clean Water Act Section 401, 33 U.S.C. § 1341.[7] Congress authorized Indian tribes, upon approval by EPA, to develop and enforce standards for the protection of water quality on their reservations. 33 U.S.C. § 1377(e). Tribes with EPA-approved water quality standards have authority under Section 401 to certify that federally licensed activities within the reservation comply with the tribal standards. *Id.;* 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 131.4(c).

Approved tribes may also object under Section 401 and initiate a dispute resolution process if a State proposes to certify a federally licensed project upstream of the reservation that could violate the water quality standards of the downstream tribe. *See Wisconsin v. EPA,* 266 F.3d 741, 748-49 (7th Cir. 2001); 33 U.S.C. § 1341(a)(2); 33 U.S.C. § 1377(e); 40 C.F.R. §§ 121.11-121.16; 40 C.F.R. § 131.7. Congress promoted both the unique interest that Indian tribes

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for Section 401 purposes does not require that a pollutant be added.

[7] Congress amended the Clean Water Act to authorize EPA to treat tribes as states in the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended at 33 U.S.C. § 1377 (2000)).

have in water quality protection and the United States' trust obligation to tribes by authorizing tribes to formally object to activities, such as federally licensed dams, that could degrade water quality on the reservation.

Not every Indian tribe seeks, or is granted, authorization to regulate water quality on its reservation. EPA is authorized by Congress to treat an Indian tribe as a State for Clean Water Act purposes only if "the tribe has a governing body carrying out substantial governmental duties and powers" and if EPA reasonably expects the tribe to be able to regulate water quality in compliance with the Clean Water Act. 33 U.S.C. § 1377(e). EPA evaluates tribal requests for TAS status on a case by case basis in accordance with its application requirements found at 40 C.F.R. § 131.8(b).[8]

Once EPA approves an Indian tribe for TAS, the tribe, like states, may develop water quality standards to protect designated uses on the reservation. *See* 33 U.S.C. § 1313(c)(2)(A). Tribes may not implement their water quality standards until the standards are approved by EPA.

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[8] To qualify for TAS under EPA regulations, an Indian tribe must submit an application to the EPA which includes: a statement that the tribe is recognized by the Secretary of the Interior; a descriptive statement demonstrating that the tribal governing body is currently carrying out substantial government functions over a defined area; a description of the tribe's capability to administer an effective water quality standards program; and any additional documentation which the Administrator deems necessary to support a tribal application. 40 C.F.R. § 131.8; *City of Albuquerque v. Browner*, 97 F.3d 415, 422 n.8 (10th Cir. 1996).

See 33 U.S.C. § 1313 (c)(3); 40 C.F.R. § 131.5. Like water quality standards developed by states, tribal standards are authorized directly by the Clean Water Act and have the force of federal law. *See Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (stating that water quality standards are part of the federal law of water pollution control). Tribes, like states, may also object under Section 401 when federally licensed activities, such as hydroelectric dams, could cause or contribute to violations of EPA-approved tribal water quality standards. 33 U.S.C. § 1341; 33 U.S.C. § 1377(e).

Tribal water quality standards, while often similar to state standards, sometimes seek specific safeguards of water on the reservation due to tribal cultures' unique reliance on water resources. *City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996). Tribal standards may designate uses, such as for cultural or religious purposes, that are not specifically protected by state standards. *See id.* at 427 (discussing Isleta Pueblo tribe's "primary contact ceremonial use" standard). Like states, tribes retain some measure of control over activities that occur on non-tribal land within or upstream of the reservation, but which contribute to violations of water quality standards on the reservation. *Wisconsin*, 266 F.3d at 750 (noting "Since a state has the power to require upstream states to comply with its water quality standards, to interpret the [Clean Water Act] to deny that power to tribes because of some kind of formal view of sovereignty would treat tribes as second class citizens").

Since rivers often flow through multiple state and tribal sovereigns, Congress established a federal mechanism to resolve disputes between upstream and downstream states, and between states and tribal governments where the water quality standards of the respective sovereigns differ. *Id.* at 748-49; 33 U.S.C. § 1341(a)(2); 33 U.S.C. § 1377(e); 40

C.F.R. §§ 121.11-121.16; 40 C.F.R. § 131.7. Therefore, if a federal license for an upstream activity could be certified under Section 401 in compliance with state water quality standards, but not tribal standards, the downstream tribe may initiate a dispute resolution process, with either EPA, or the federal licensing agency, serving as the ultimate arbiter. *Id.* This process gives affected tribes a meaningful role in protecting water quality from the impacts of federally licensed activities upstream of the reservation.

Appellant's characterization of the water quality certification process as a "power grab" is no more applicable to tribes than it is to states. Congress intended the Clean Water Act as a cooperative, multi-sovereign system for water pollution control, with the federal government, states, and approved Indian tribes all playing crucial roles. Under Congress' scheme, the substantive provisions of the Clean Water Act are implemented primarily by the sovereign states and tribes whose waters suffer the adverse impacts of pollution. *See* 33 U.S.C. § 1251(b). The Court should reject Appellant's attempt to narrow the state and tribal role in protecting the quality of waters that flow through the lands for which they have the responsibilities of sovereigns.

Congress' recognition of tribal authority to regulate the quality of water within reservation boundaries furthers the United States' trust responsibility to tribes by recognizing tribes' unique dependence on water and aquatic resources within the reservation. The federal government, as trustee to tribes, stays closely involved in the tribal regulation of water quality under the Clean Water Act. EPA must approve the regulatory authority of tribes, approve the water quality standards created by tribes, and resolve any disputes between upstream states and downstream tribal governments who share the authority to certify federal projects in compliance

with their respective water quality standards. 33 U.S.C. § 1377(e); 40 C.F.R. § 131.5; 40 C.F.R. § 131.7. Whether viewed as a delegation of authority to tribes by Congress, or as a Congressional reinvestment of tribal sovereignty,[9] the Clean Water Act recognizes that tribes are entitled to regulate activities that have the potential to degrade the quality of waters that flow through their reservations.

The water quality certification process in Section 401 provides a critical mechanism for EPA-approved Indian tribes, such as the *amici curiae* Tribes, to ensure that federally licensed activities do not degrade tribal water quality standards. The narrow interpretation of Section 401 advocated by Appellant would prevent tribal governments from protecting reservation water quality from the impacts of federally licensed dams that cause significant pollution and contribute to violations of tribal water quality standards.

II. FEDERALLY LICENSED DAMS HAVE SIGNIFICANT IMPACTS ON WATER QUALITY AND THE PROPERTY RIGHTS OF INDIAN TRIBES SUCH AS AMICI CURIAE.

Federally licensed dams have significant impacts on Indian tribes not only due to the fact that many dams are

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[9] *See* Anne E. Tweedy, *Using Plenary Power As A Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After United States v. Lara*, 35 ENVTL L. 471 (2005) (arguing that 33 U.S.C. § 1377 may be viewed as a reinvestment of tribal sovereignty for purposes of water quality regulation); David F. Coursen, *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Laws and Regulations*, 23 ENVT. L. REP. 10579 (1993).

located on or near Indian reservations, but also because the dams create significant pollution that interferes with Indian tribes' reserved rights to water and fish. The Tribes ask the Court to look beyond the Appellant's narrowly tailored arguments and consider the broader implications of exempting federally licensed dams from the certification authority provided in Section 401.

The question presented in this case, as framed by Appellant, is whether the "mere flow of water" through a dam constitutes a "discharge" for purposes of Section 401. Appellant would have this Court imagine a dam to be nothing more than a bridge beneath which water is not obstructed or altered in any way, but "merely flows" through a porous structure in the riverbed. The dams that affect the *amici curiae* Tribes, like many of the large hydroelectric and storage dams in the Western United States, are not nearly so benign.

The Klamath Hydroelectric Project, built upstream of the Hoopa Valley Reservation in the early twentieth century, is representative of many hydroelectric projects in the western United States. The formerly free-flowing Klamath River is blocked by six separate dams, which form shallow reservoirs behind them. These reservoirs increase water temperature and provide optimal conditions for nutrient loading and outbreaks of algal blooms. On September 30, 2005, EPA, the State of California North Coast Regional Water Board and the Karuk Indian Tribe issued a joint public health alert due to an outbreak of the toxic algae *Microcystis aeruginosa* within and downstream of the Klamath

Hydroelectric Project.[10] Scientists recorded the toxic algae at levels that exceeded World Health Organization standards for recreational use by 468 times. As stated in the public health alert: "Warm and calm surface water created by Iron Gate and Copco Reservoirs [reservoirs within the Klamath Hydroelectric Project] provide an ideal environment for the growth of large algal blooms." These algal species, which bloom and thrive in the stagnant reservoirs behind the dams, pass through the dams polluting downstream waters and posing risks to human and aquatic health.

Combinations of stagnant water conditions, low dissolved oxygen, and increased water temperature caused, in part, by dams are also lethal to fish. In 2002, Klamath River communities witnessed the largest recorded adult fish kill in United States history. Approximately 33,000 chinook, coho, and steelhead salmon were found dead as a result of degraded water quality in the Klamath River between September 20 and 27, 2002. *See Pacific Coast Federation of Fishermen's Associations v. United States Bureau of Reclamation*, 426 F.3d 1082, 1089 (9th Cir. 2005) (citing fish kill).

The larger storage and hydroelectric dams of the West have additional pollution problems:

> Dams accumulate sediments, which over time may absorb other types of pollutants such as PCBs, pesticides, and heavy metals. Releases of water containing these sediments can inundate downstream habitats and shorelines with sediments harmful to

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[10] The health alert is available on the EPA webpage at http://yosemite.epa.gov/r9/r9press.nsf/newsbyyear?ReadForm&year=2005 (Sept. 30, 2005 press release).

> humans and aquatic life. The sediments also contain toxic pollutants such as dioxins and heavy metals such as mercury, which can be re-suspended in the downstream waters upon discharge.

Alison M. Dornsife, *From A NonPollutant Into A Pollutant: Revising EPA's Interpretation Of The Phrase "Discharge Of Any Pollutant" In The Context Of NPDES Permits*, 35 ENVTL L. 175, 177 (2005) (citations omitted); *see also id.* at 180-82 (detailing the significant environmental impacts of dam discharges).

As a result of this collection of polluted sediment behind dams, the algae generated in the dams' reservoirs, and the thermal and chemical impacts of the reservoirs, water discharged out of dams carries pollutants and related water quality problems into the downstream water-body at a significantly higher concentration level than would otherwise exist without the dams in place.

A ruling in favor of Appellant may mean that the water quality impacts associated with the Klamath Hydroelectric Project, and the numerous other dams currently seeking re-licensing,[11] receive little attention. The Court should decline Appellant's invitation to issue a ruling that significantly sets back Congress' goal of attaining fishable

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[11] Forty-six federally licensed hydroelectric projects are undergoing or scheduled to undergo re-licensing in California between 1997 and 2016. *See* California Energy Commission Staff Report, *California Hydropower System: Energy and Environment Appendix D* (Oct. 2003), at p. D-19, *available at* http://www.energy.ca.gov/reports/2003-10-30_100-03-018.PDF.

and swimmable waters throughout the nation. *See* 33 U.S.C. § 1251(b). The Court should affirm state and tribal rights to regulate the quality of waters within their borders, as envisioned by Congress in the Clean Water Act.

III. HYDROELECTRIC DAM OPERATIONS RESULT IN A DISCHARGE AND ARE PROPERLY SUBJECT TO THE WATER QUALITY CERTIFICATION AUTHORITY IN SECTION 401.

Appellant's primary argument, that "discharge" should be interpreted synonymously with "discharge of a pollutant" strains the language of the Clean Water Act and should be rejected. The Clean Water Act distinguishes the terms "discharge" and "discharge of a pollutant." "The term 'discharge of a pollutant' . . . *means* any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). In contrast, "the term 'discharge' when used without qualification *includes* 'a discharge of a pollutant.'" 33 U.S.C. § 1362(16) (emphasis added).

"The use of the term 'includes' in a statutory definition indicates that the definition that follows is a non-exclusive list that can be enlarged, and that items not clearly listed in the definition may nonetheless be covered by the term." Alia S. Miles, *Searching for the Definition of "Discharge": Section 401 Of The Clean Water Act*, 28 ENVTL L. 191, 212 (1998), *citing Helvering v. Morgan's Inc.*, 293 U.S. 121, 125 n.1 (1934) (holding that "the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition"); *Chemehuvi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1054 (9th Cir. 1985) (holding that "includes" is a term

of enlargement, not of limitation), *rev'd on other grounds,* 474 U.S. 9 (1985).

Appellant's merging of the terms "discharge" and "discharge of a pollutant" contradicts the definitional guidance provided by Congress in the Clean Water Act. Congress intended "discharge," when standing alone, to be broader and more inclusive than the defined term "discharge of a pollutant." *See Oregon Natural Desert Ass'n* at 1098 (stating the term "discharge" is broader than "discharge of a pollutant" because "discharge" includes "all releases from point sources, whether polluting or nonpolluting").

Appellant's argument also abuses the plain and ordinary meaning of the term "discharge." "Discharge," as defined by Webster's Dictionary means "a flowing or issuing out; something that is emitted." Webster's Ninth New Collegiate Dictionary 360 (1991); *see also PUD No. 1 of Jefferson County v. Washington Dep't of Ecology,* 511 U.S. 700, 725 (1994) (Thomas, J., dissenting) (stating "[t]he term 'discharge' is not defined in the CWA, but its plain and ordinary meaning suggests 'a flowing or issuing out,' or 'something that is emitted'").

The operation of hydroelectric dams results in a "discharge" into waters of the United States, triggering certification authority under Section 401.[12] Dams, such as

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[12] *See PUD No. 1 of Jefferson County,* 511 U.S. at 711 (assuming that the release of water at the end of a dam's tailrace after water has been used to generate electricity constitutes a "discharge" under section 401); *Alabama Rivers Alliance v. FERC,* 325 F.3d 290, 296 (D.C. Cir. 2003) (holding that increased flow of water, and particularly of low dissolved oxygen water passing through dam turbines

those in the Klamath Hydroelectric Project, block free-flowing water, store it temporarily in reservoirs (accumulating sediment, removing dissolved oxygen, and generating toxic algal blooms), divert the water into a power canal which extends for hundreds of yards, send the water down penstocks and through turbines to generate electricity, and then discharge used water back into the river downstream of the dam. Moreover, since power production is not continuous, the volume, intensity, and timing of these discharges varies, sending large amounts of water downstream at times, while storing water for future power production at other times. This operational aspect of hydroelectric dams, known as "peaking," results in additional harm to aquatic habitat by altering traditional river flows, and alternately flooding and de-watering habitat in the downstream riverbed.

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constituted a "discharge"); *State of North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997) (assuming *arguendo* that the flow of water through dam turbines is a "discharge" as defined by Section 401, but holding that the "withdrawal" of water is not a "discharge"); *National Wildlife Fed'n v. FERC*, 912 F.2d 1471 (D.C. Cir. 1990) (stating "common sense supports FERC's conclusion that the discharge in this case would occur at the dam, where the flow of water would be blocked and consequently the water would be backed up"); *In re City of Fort Smith*, 42 F.E.R.C. ¶ 61,362, at 62,047 (1988) (finding a "discharge" to occur over the dam and from the powerhouse tailrace), *on reh'g* 44 F.E.R.C. ¶ 61,160 at 61,513 (1988), *aff'd*, 912 F.2d 1471 (D.C. Cir. 1990).

The Court should reject Appellant's attempt to merge the water quality certification authority of Section 401 with the permitting authority of Clean Water Act Section 402, 33 U.S.C. § 1342. Those authorities have different origins, different purposes, and contain different statutory language. Judicial interpretations of Section 402 and the expressly-defined phrase "discharge of a pollutant" do not determine the proper interpretation of Section 401 and the broader, more inclusive, term "discharge."

CONCLUSION

The Court should affirm the judgment of the Maine Supreme Judicial Court and affirm state and tribal authority under Clean Water Act Section 401, 33 U.S.C. § 1341, to protect their waters from federally-licensed dams that threaten to impair them.

Respectfully submitted.

Thomas P. Schlosser*
Thane D. Somerville
*Counsel of Record
MORISSET, SCHLOSSER, JOZWIAK & MCGAW
801 Second Ave., Ste. 1115
Seattle, WA 98104-1509
(206) 386-5200
Counsel for Amicus Curiae Hoopa Valley Tribe

Carl Ullman
The Klamath Tribes
P.O. Box 957
1501 Chiloquin Blvd.
Chiloquin, OR 97624
Counsel for Amicus Curiae Klamath Tribes of Oregon

Daniel A. Raas
Raas, Johnsen & Stuen, P.S.
P.O. Box 5746
1503 "E" Street
Bellingham, WA 98227
Counsel for Amicus Curiae
Lummi Nation

James Noteboom
Ellen Grover
Karnopp, Petersen LLP
Riverpointe One
1201 N.W. Wall St., Ste. 300
Bend, OR 97701-1936
Counsel for Amicus Curiae
Confederated Tribes of the Warm
Springs Reservation of Oregon

January 5, 2006

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No. 04-1527

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SUPREME COURT

IN THE

Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

ON WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

AMICUS CURIAE BRIEF OF MICCOSUKEE TRIBE OF INDIANS OF FLORIDA IN SUPPORT OF RESPONDENT

DEXTER W. LEHTINEN
Counsel of Record
CLAUDIO RIEDI
KELLY S. BROOKS
LEHTINEN, VARGAS, & RIEDI, P.A.
7700 North Kendall Drive
Suite 303
Miami, FL 33156-7559
(305) 279-1166

SONIA ESCOBIO O'DONNELL
ENRIQUE D. ARANA
JORDEN BURT LLP
777 Brickell Avenue
Suite 500
Miami, FL 33131

Counsel for Amicus Curiae
Miccosukee Tribe of Indians

198762

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Does *South Florida Water Management District v. Miccosukee Tribe of Indians of Florida*, 541 U.S. 95 (2004), address whether the conveying of a river's water through an existing dam constitutes a "discharge," requiring a state water quality certification under Section 401 of the Clean Water Act.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. *MICCOSUKEE*'S NARROW HOLDING DOES NOT SUPPORT PETITIONER'S CLAIM THAT A SECTION 401 CERTIFICATION IS NOT REQUIRED IN THIS CASE	4
A. The Narrow Holding of *Miccosukee*	4
B. The Tribe Has Always Taken The Position That Pumping Water From One Part Of A Water Body Into Another Can Constitute An Addition Of Pollutants	6
C. *Miccosukee* Does Not Support Petitioner's Argument Here	8

Contents

Page

II. THE "AGENCY INTERPRETATION" RELIED UPON BY PETITIONER AND *AMICI* IS NOT ENTITLED TO DEFERENCE 9

CONCLUSION 16

APPENDIX 1a

TABLE OF CITED AUTHORITIES

Page

CASES:

Arriaga v. Florida Pacific Farms, L.L.C., 305 F.3d 1228 (11th Cir. 2002) 12

Catskill Mountains Chapter v. New York, 273 F.3d 481 (2d Cir. 2001) 13

Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984) 11, 12

Christensen v. Harris County, 529 U.S. 576 (2000) 12

City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981). 14

Dubois v. United States Department of Agriculture, 102 F.3d 1273 (1st Cir. 1996) 7, 13

Friends of the Everglades v. SFWMD, case no. 02-80309-CIV-Altonaga/Turnoff 10

Jama v. Immigration & Customs Enforcement, 543 U.S. 335 (2005) 6

James City County, Virginia v. EPA, 12 F.3d 1330 (4th Cir. 1993) 15

Cited Authorities

Page

Marange v. Fontenot, 879 F. Supp. 679 (E.D. Tex. 1995) 6

Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985) 14

S.D. Warren v. Board of Environmental Protection, 868 A.2d 210 (Me. 2005) 9

Sierra Club v. Abston Constr. Co. Inc., 620 F.2d 41 (5th Cir. 1980) 13

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 12

South Florida Water Management District v. Miccosukee Tribe of Indians of Florida, 541 U.S. 95 (2004) .....*passim*

Trustees for Alaska v. EPA, 749 F.2d 549 (9th Cir. 1984) 13

United States v. Earth Sciences, 599 F.2d 368 (10th Cir. 1979) 13

United States v. Mead Corp., 533 U.S. 218 (2001) 13

Cited Authorities

Page

STATUTES, RULES & REGULATIONS:

33 U.S.C. § 1251 (Clean Water Act § 101) ... 10, 14, 15

33 U.S.C. § 1311 ..... 11, 14

33 U.S.C. § 1314 (Clean Water Act § 304) 10, 13

33 U.S.C. § 1341 (Clean Water Act § 401) ... 3, 8, 9, 11

33 U.S.C. § 1342 (Clean Water Act § 402) ..... *passim*

33 U.S.C. § 1362 ..... 4, 9, 11, 14

33 U.S.C. § 1365 14

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IN THE

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S.D.WARREN COMPANY,

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MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

ON WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

AMICUS CURIAE BRIEF OF MICCOSUKEE TRIBE OF INDIANS OF FLORIDA IN SUPPORT OF RESPONDENT

With the written consent of the parties given and filed with the Clerk of the Court, the Miccosukee Tribe of Indians of Florida ("Tribe") respectfully submits this brief as *amicus curiae*.[1]

1. Counsel for *amicus curiae* have authored this brief in whole and no other person or entity other than amicus, its members or counsel have made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The Miccosukee Tribe of Indians of Florida is a federally-recognized Indian Tribe, whose members live in the Florida Everglades, an historically distinct and internationally significant wetlands ecosystem. The culture, health and well being of the Tribe is dependent on preserving the chemical and physical water quality of the Florida Everglades. Accordingly, the Tribe has consistently participated in efforts to protect the Everglades from pollution that threatens to alter and degrade the water quality of these wetlands.

The Tribe was the Plaintiff/Respondent in *South Florida Water Management District v. Miccosukee Tribe of Indians of Florida*, 541 U.S. 95 (2004). The Petitioner in this case has made arguments regarding the holding in *Miccosukee* that the Tribe believes are incorrect.

Miccosukee resolved the question presented: whether the NPDES program covers a point source only when pollutants originate from the point source and not when pollutants originating elsewhere merely pass through a point source. This Court held that the definition of a point source makes it plain that the point source need only convey the pollutant to navigable waters.

The *Miccosukee* Court also recognized that both of the lower federal courts had made a "predicate determination" on a motion for summary judgment that the discharging S-9 pump station at issue conveyed waters between two distinct water bodies resulting in the addition of pollutants to the receiving waters. However, the Court remanded the *Miccosukee* case to the district court for the development of a more complete record on allegedly disputed facts that would

establish whether the C-11 drainage canal from which polluted waters were withdrawn was meaningfully distinct from the WCA-3 Everglades wetlands into which the polluted waters were discharged. The district court in *Miccosukee* has not yet resolved the factual issue to be decided on remand.

The Tribe has an interest in this case because Petitioner has misconstrued the *Miccosukee* decision and seeks to use the decision, which involved a Section 402 permit and a very narrow holding, as precedent for determining whether a Section 401 certification is required under the Clean Water Act ("CWA") for discharges of water through a river's hydroelectric dams. The Petitioner also attempts to use a litigation memorandum drafted by counsel for the Environmental Protection Agency ("EPA") for a case in which the Tribe is Plaintiff-Intervenor and which is still being litigated below. The Tribe has an interest in addressing this issue as well.

SUMMARY OF ARGUMENT

This case presents the question whether dammed river waters may lawfully be discharged into downstream waters without obtaining a Section 401 state water quality certification under the CWA. The Petitioner, and *amici* on behalf of Petitioner, misconstrue *Miccosukee* and argue that it compels the conclusion that a Section 401 state water quality certification for a discharge is not required. However, as shown below, *Miccosukee's* very narrow holding does not support this conclusion. Moreover, the Petitioner and *amici*'s reliance on an EPA litigation memorandum, issued on the date of the summary judgment motions deadline in district court in an unrelated case in order to obtain a litigation advantage, should be rejected; that memorandum is not entitled to deference.

ARGUMENT

I. *MICCOSUKEE*'S NARROW HOLDING DOES NOT SUPPORT PETITIONER'S CLAIM THAT A SECTION 401 CERTIFICATION IS NOT REQUIRED IN THIS CASE

A. The Narrow Holding Of *Miccosukee*

In *Miccosukee*, this Court found "untenable" the petitioner's argument that it did not need a Section 402 permit because its S-9 pump station was not itself adding anything to the polluted water being discharged into waters of the United States. The Court rejected the petitioner's proposed reading of the definition of "discharge of a pollutant" contained in 33 U.S.C. § 1362(12) because "[t]hat definition includes within its reach point sources that do not themselves generate pollutants." *Miccosukee*, 541 U.S. at 105. This is the only question on which the *Miccosukee* Court granted certiorari and the only substantive issue decided by the Court. Thus, the *Miccosukee* case holds that under Section 402 of the CWA, the pollutants being added to the receiving waters need not be generated by the point source itself. *Id.*

The *Miccosukee* opinion also noted that both the district court and the Eleventh Circuit rested their holdings on the "predicate determination" that the C-11 canal and the WCA-3 wetlands were distinct waters of the United States. *Id.* at 99. This Court explained that it would not address the adequacy of the legal test used by the trial court to determine whether the C-11 canal and the WCA-3 wetlands were distinct waters of the United States: "[i]nstead, we hold *only* that the District Court applied its test prematurely." *Id.* at 111 (emphasis added). It is thus clear that the *Miccosukee* opinion decided the question

presented and does no more than reverse what it believed was a premature summary judgment and remand for a fuller development of the factual record.

Petitioner incorrectly argues that "*Miccosukee* thus holds that merely taking control over water in a man-made facility to cause it to travel from one point to another is not an addition of anything to the waters if the water at the entrance and the exit of the facility are not meaningfully distinct water bodies." Pet. Brief at 21. *Amici* incorrectly argue that this Court in *Miccosukee* "held that the mere pumping of water from one part of a water body into another part of the same water body does not constitute an 'addition' of a pollutant; therefore, no discharge occurs for purposes of Section 402 of the CWA." Br. of *Amicus Curiae* Salt River Project Agric. Improvement & Power Dist. at 9. Other *amici* incorrectly argue:

> A fundamental flaw in the SJC's decision is its failure to address this Court's holding in *Miccosukee*. In *Miccosukee*, the Court considered what constitutes an 'addition' in the context of Section 402 of the CWA, where water was pumped from a canal to a water conservation area sixty feet away. 541 U.S. at 100, 104-05. This Court confirmed that a 'discharge of a pollutant' occurs only when the water body receiving the water is 'meaningfully distinct' from the water body that was the source of the water. *Id.* at 112.

Br. of *Amicus Curiae* Nat'l Ass'n of Home Builders at 8-9. However, *Miccosukee* does not hold as Petitioner and *amici* state.

Perhaps as a result of a mistaken belief that the Tribe had conceded that, if the WCA-3 wetlands and the C-11 canal were not meaningfully distinct water bodies the pump station would not need a permit,[2] the Court in *Miccosukee* noted:

> After reviewing the full record, it is possible that the district court will conclude that C-11 and WCA-3 are not meaningfully distinct water bodies. If it does so, then the S-9 pump station will not need an NPDES permit.

Id. at 112. However, this statement in *Miccosukee* is *dicta* because it is simply an expression of judicial opinion about the way the law would be if applied to facts not before the court. *Marange v. Fontenot*, 879 F. Supp. 679, 686 n.5 (E.D. Tex. 1995); *see also Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 125 S. Ct. 694, 706 n.12 (2005) ("Dictum settles nothing, even in the court that utters it."). *Miccosukee* held only that summary judgment was premature and that the point source need not originate the pollutant in order to be covered by the permit requirements of § 402 of the CWA.

B. The Tribe Has Always Taken The Position That Pumping Water From One Part Of A Water Body Into Another Can Constitute An Addition Of Pollutants

This Court in *Miccosukee* stated that "the Tribe does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants." *Miccosukee*, 541 U.S. at 109. *Amici* argue here that "[i]n *Miccosukee*, the Court noted with approval the Miccosukee Tribe's concession

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2. *See* argument Section I.B., *infra*.

'that if [the C-11 canal] and [the WCA-3 wetlands] are *simply two parts of the same water body*, pumping from one into the other cannot constitute an 'addition' of pollutants.'" Br. of Amicus Curiae Augusta, Ga. at 7. In fact, this was not the Tribe's position in *Miccosukee* and it is not the Tribe's position here. Indeed, the Tribe sought rehearing on this point to clarify the record. *See* Tribe's Petition for Rehearing, attached as appendix herein.

Relying on *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), the Tribe's counsel explained at oral argument in *Miccosukee* that whether the WCA-3 and the C-11 are considered to be one body of water (i.e., hydrologically connected) or not is irrelevant because water from the C-11 naturally flows in an easterly direction - away from WCA-3. (Tr. at 37-38). As the *Dubois* Court explained:

> The [] 'hydrological connectedness' proposal ignores a fundamental fact about water: the direction of flow. It is true that Loon Pond and the East Branch of the Pemigewasset River are "hydrologically connected" in the sense that water from the pond flows *down* and eventually empties into the River. But water from the East Branch certainly does not flow *uphill* into Loon Pond, carrying with it the pollutants that have undisputedly accumulated in the East Branch water from some of the other sources of water entering the East Branch from upstream. Under such circumstances, defendants cannot credibly argue that these water bodies are so related that the transfer of water *from* the East Branch *to* Loon Pond is not an "addition" of water from one of the "waters of the United States" to another.

Dubois, 102 F.3d at 1298.

The conclusion that the Tribe conceded this point is incorrect. As the Tribe stated in its Petition for Rehearing to this Court: "[a]ccordingly, the Tribe did not, and has never conceded that permits would not be required if it is determined that the C-11 and the WCA-3A are one, interconnected body of water." Petition for Rehearing at 3.

C. *Miccosukee* Does Not Support Petitioner's Argument Here

The lower courts in this case considered whether the Maine Board of Environmental Protection ("BEP") had jurisdiction to issue a water quality certification under Section 401 of the CWA for the renewal of Federal Energy Regulatory Commission ("FERC") operating licenses for the Petitioner as operator of six hydro-electric dam structures in Maine. The Section 401 state water quality certifications are required as a pre-condition to issuance or renewal of federal licenses or permits for any structures that "may result in any discharge into navigable waters." 33 U.S.C. § 1341(a)(1). The BEP issued the Section 401 water quality certification with certain conditions and a re-opener clause, permitting future review of the water quality certification under certain conditions.

On this appeal, Petitioner for the first time invokes the *Miccosukee* case and suggests it holds that Section 401 certification is not required if water at the entrance and the exit of a dam are not meaningfully distinct. However, as noted above, the *Miccosukee* decision contained no such holding. Indeed, *Miccosukee* does not make any reference to the certification requirements of Section 401. Rather, the *Miccosukee* decision addressed whether Section 402 of the CWA requires a permit for the operation of a structure pumping pollutants, against the forces of gravity, into the waters of the Everglades.

Section 402(12) of the CWA defines the term "discharge of pollutants" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). Thus, Section 402 requires NPDES permits for discharges, such as the ones addressed in the *Miccosukee* decision, that actually add pollutants to navigable waters of the United States. Section 401(a)(1), in contrast, requires applicants for federal permits or licenses to obtain water quality certifications for structures that "*may* result in *any* discharge into navigable waters," and does not speak of "pollutants." 33 U.S.C. § 1341(a)(1)(emphasis added). Accordingly, although structures discharging or "adding" pollutants would likely be included in operations that "may result in any discharge into navigable waters," there could be many additional operations that "may result in a discharge into navigable waters," without actually adding any pollutants from any point source. Accordingly, whether a structure in fact adds pollutants, within the Section 402 definition of the term, would not determine whether the structure requires the threshold water quality certification under Section 401 of the CWA. It is sufficient that the structure "may result in any discharge." The Supreme Judicial Court of Maine correctly relied upon this distinction in *S.D. Warren v. Board of Environmental Protection*, 868 A.2d 210 (Me. 2005).

II. THE "AGENCY INTERPRETATION" RELIED UPON BY PETITIONER AND *AMICI* IS NOT ENTITLED TO DEFERENCE

Petitioner's brief refers to an August 5, 2005 litigation memorandum authored by General Counsel for the EPA, although no argument is provided regarding how this Court should treat this memorandum. *Amici* in support of Petitioner argue that since the decision in *Miccosukee*, EPA has

"formally" articulated its interpretation of Section 402's permitting requirement with respect to water diversions and conveyances and that this formal interpretation confirmed EPA's long-standing practice and is consistent with earlier circuit court decisions. Br. of *Amici Curiae* Western Urban Water Coalition at 5; *see also* Br. of *Amicus Curiae* Nat'l Ass'n of Home Builders at 8 (referencing the "Agency interpretation of August 5, 2005). As shown below, this document is not entitled to deference.

The litigation memorandum of August 5th referred to by Petitioner and *amici* was created for the case styled *Friends of the Everglades v. SFWMD*, case no. 02-80309-CIV-Altonaga/Turnoff, in which the Tribe is a Plaintiff-Intervenor. In that case, the Government attempted to obtain an advantage by issuing a last minute "opinion" that simply restated its litigation position. The Government relied on this memorandum in its motion for summary judgment arguing that the memorandum was an agency interpretation entitled to deference. The district court correctly denied the Government's summary judgment motion. D.E. 527, case no. 02-80309.

The EPA litigation memorandum purports to advocate a "holistic" approach to the CWA, while actually arguing that the separate, interrelated regulatory measures of the CWA be ignored by means of unauthorized, ad hoc "exemptions" to its express permitting requirements. The litigation memorandum restated the Government's arguments in case no. 02-80309 relying on non-point source regulation, Section 101(g), and Section 304 as exemptions to the Section 402 permit requirements of the CWA and also provided what EPA believed was a modified version of the "unitary waters theory" argued by the United States in *Miccosukee*.

The litigation memorandum is not entitled to deference for several reasons. First, no deference is appropriate when the statutory language is clear. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984). The CWA requires a Section 402 permit for "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1311, 1342 and 1362(12). Thus, the provisions of the CWA are quite clear: if there is a discharge of pollutants from a point source, a permit is required. That is the end of the inquiry. No deference to the agency is necessary or appropriate. *Id.*

The agency interpretation disregards the clear statutory language of the CWA and adopts wholesale the defendants' litigation position that point source discharges of pollutants do not need Section 402 permits under the CWA. No deference at all should be accorded to the agency's legal memorandum, because it disregards the provisions of the CWA that require Section 402 permits for all discharges from point sources into navigable waters. To reach the result urged in the agency's litigation memorandum, the plain language of the CWA would have to be rewritten to prohibit "any addition of any pollutant to navigable waters from any point source *unless the point source conveys or connects other navigable waters.*" Because the statutory language plainly and unambiguously requires an NPDES permit, and the agency's litigation memorandum is contrary to Congress' unambiguously expressed intent, that memorandum is not entitled to deference.[3]

---

3. Petitioner's argument that the EPA litigation memorandum directs a conclusion that Section 401 certification is not required in this case also ignores the fact that the litigation memorandum was drafted for a case that involved Section 402 NPDES permit requirements, not Section 401 certification.

Moreover, deference under *Chevron* is only appropriate in reviewing administrative action that is the result of notice and comment rule-making, or formal adjudication, or where there are persuasive indications that Congress intended for the agency action to have the force of law. *See United States v. Mead Corp.*, 533 U.S. 218, 230-32 (2001). The litigation memorandum was not the result of notice and comment rule-making, nor of any formal adjudication. The agency litigation memorandum is not a regulation formally prescribed by the EPA pursuant to its delegated authority. Instead, it is a legal memorandum prepared by EPA General Counsel that simply restates the United States' litigation position in a case that is still being litigated in the district court. Thus, there can be no argument that the litigation memorandum is entitled to *Chevron* deference.

If the agency action at issue is not a formal regulation or adjudication, the agency action may be "'entitled to respect' under [this Court's] decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1238 (11th Cir. 2002) ("Agency interpretations expressed in opinion letters must be viewed through the standard enunciated in *Skidmore*."). Under the *Skidmore* doctrine, the agency interpretation's power to persuade should be considered in light "of its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight." *Mead Corp.*, 533 U.S. at 235. As shown below, the EPA litigation memorandum lacks thoroughness and logic, and is inconsistent with prior agency practice and persuasive legal authority.

The litigation memorandum is unpersuasive because it relies on incorrect theories to circumvent the plain requirements of

the CWA. The Court in *Miccosukee* discussed the unitary waters theory advanced by the United States, that is, that the "waters of the United States" are one and that once a pollutant is added to any part of the waters of the United States, the resulting polluted water can then be added to the remaining waters of the United States without further regulation under the CWA. The *Miccosukee* Court noted the Government's theory would lead to the conclusion that Section 402 permits would not be required even if "one water body were polluted and the other pristine and the two would not otherwise mix." *Id.* at 105-06 (citing *Catskill Mountains Chapter v. New York*, 273 F.3d 481, 492 (2d Cir. 2001); *Dubois v. United States Dept. of Agriculture*, 102 F.3d 1273 (1st Cir. 1996)).

The Court also characterized the Government's unitary waters argument as contending that Congress intended that such pollution be addressed through local non-point pollution programs. The Court noted, however, that "§ 1314(f)(2)(F) does not explicitly exempt non-point pollution sources from the NPDES program if they *also* fall within the 'point source' definition. And several NPDES provisions might be read to suggest a view contrary to the unitary waters approach." *Id.* at 106-07. Indeed, any attempt to use non-point source regulation as a substitute for permit requirements is contrary to the CWA and has been rejected by the few circuit courts of appeal that have addressed the issue. *See United States v. Earth Sciences*, 599 F.2d 368, 373 (10th Cir. 1979) (holding that Section 304(f) lists activities that "may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation"); *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) (same); *Sierra Club v. Abston Constr. Co. Inc.*, 620 F.2d 41, 44 (5th Cir. 1980) (same). Thus, this Court questioned the unitary waters theory although leaving it open to be raised for further development on remand.

Moreover, there is no exemption in the CWA for state water allocation activities. In order to meet the objective of "restor[ing] and maintain[ing] [the] chemical, physical and biological integrity of [the] Nation's waters," 33 U.S.C. § 1251, the CWA makes unlawful without an NPDES permit "the discharge of any pollutant by *any person*." 33 U.S.C. §§ 1311 & 1342 (emphasis added). The term "person" is defined to include states and any political subdivision of a state. 33 U.S.C. § 1362. Citizen suits are authorized to enforce the permit obligation against "any [] governmental instrumentality or agency . . . permitted by the eleventh amendment." 13 U.S.C. § 1365. Thus, the plain language of the CWA subjects state and local governments to the permitting requirements. As this Court has explained, "[*e*]*very* point source discharge is prohibited unless covered by a permit . . ." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 318 (1981).

There is no express exemption in the CWA for state water allocation activities. Instead, the Act's "Congressional declaration of goals and policy" section states, among other things, that "[i]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." 33 U.S.C. § 1251(g). Section 101(g) does not say that if a state is involved in water allocation activities it is not required to obtain a permit for discharges of pollutants into navigable waters. Moreover, CWA regulation of water *quality* is perfectly consistent with State authority to allocate water *quantities*. For these reasons, it is well-settled that Section 101(g) does not create an exemption from the requirements of the CWA but rather "is only a general policy statement" which cannot nullify the clearly expressed will of Congress requiring compliance with the permitting requirements of the Act. *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 514

(10th Cir. 1985); *see also James City County, Virginia v. EPA*, 12 F.3d 1330, 1336 (4th Cir. 1993).

In short, the Government's arguments, which attempt to create exemptions by using the unitary waters theory, "non-point source" arguments, as well as Section 101(g), incorrectly interpret the CWA and are not persuasive.

Additionally, the agency's position in the litigation memorandum is not consistent with prior positions and is not long-standing. The agency acknowledges the existence of a 1975 agency opinion that takes the opposite view. The litigation memorandum attempts to distinguish the 1975 opinion and then also rejects it. Certainly, however, it cannot be argued that the new agency position is long-standing. It represents a drastic change in position, with no persuasive justification such as a change in statutory language or even a regulation.

Finally, because the trial court was not given the opportunity to consider the litigation memorandum, it is unclear whether the scope of the "agency interpretation" would apply to the facts in this case, even if the opinion were entitled to any deference, which it is not.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

DEXTER W. LEHTINEN
Counsel of Record
CLAUDIO RIEDI
KELLY S. BROOKS
LEHTINEN, VARGAS, & RIEDI, P.A.
7700 North Kendall Drive
Suite 303
Miami, FL 33156-7559
(305) 279-1166

SONIA ESCOBIO O'DONNELL
ENRIQUE D. ARANA
JORDEN BURT LLP
777 Brickell Avenue
Suite 500
Miami, FL 33131

Counsel for Amicus Curiae
Miccosukee Tribe of Indians

APPENDIX A

No. 02-626

IN THE

Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA
and FRIENDS OF THE EVERGLADES, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIR-

PETITION FOR REHEARING

DEXTER W. LEHTINEN
Counsel of Record
JUAN M. VARGAS
CLAUDIO RIEDI
LEHTINEN, VARGAS & RIEDI, P.A.
7700 North Kendall Drive
Suite 303
Miami, FL 33156-7559
(305) 279-1166

SONIA ESCOBIO O'DONNELL
RICHARD J. OVELMEN
ENRIQUE D. ARANA
TODD M. FULLER
JORDEN BURT LLP
777 Brickell Avenue
Suite 500
Miami, FL 33131

DIONÈ C. CARROLL
In House General Counsel
MICCOSUKEE TRIBE OF INDIANS
OF FLORIDA
P.O. Box 440021
Tamiami Station
Miami, FL 33144

Counsel for Respondent Miccosukee Tribe of Indians of Florida

Appendix

[Table of Contents and Table of Cited Authorities intentionally omitted]

STATEMENT

Pursuant to Sup. Ct. R. 44, the Tribe requests rehearing to correct statements in the Opinion which inaccurately state the Tribe's position in this appeal, and which, if left uncorrected, could cause confusion on remand.[1] The corrections are necessary not only to reflect the clear record before the Court regarding the Tribe's long standing positions — before the district court, before the circuit court and in its brief and argument to this Court — but also because they clarify the hydrological relation between these two distinct surface water bodies. Rehearing is proper because the portion of the Opinion that was remanded contains misconceptions of fact.

---

1. The Tribe fully recognizes that rehearing petitions are granted only rarely and that they are not a vehicle for rearguing a case the Court has taken great care in deciding. *See* Sup. Ct. R. 44. Nevertheless, the Tribe understands that the Court will make changes "to correct certain inaccuracies or omissions brought to light by a petition for rehearing. . . ." Robert L. Stern, *et al.*, Supreme Court Practice 729 (8th ed. 2002) (collecting cases). The Tribe respectfully submits that the Court should grant rehearing in this case for the limited purpose of correcting two material inaccuracies in the Opinion regarding the Tribe's positions in this appeal.

Appendix

1. The Opinion Should Be Corrected To Reflect That The Tribe Does Argue That A Permit Would Be Required Even If The WCA-3 And The C-11 Are Determined To Be Two Parts Of The Same Water Body.

The Opinion states: "The Tribe does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants." *South Florida Water Management District ("SFWMD") v. Miccosukee Tribe of Indians, et al.*, 124 S. Ct. 1537, 1545 (2004). This is incorrect.

At oral argument, the Tribe's counsel argued that permits would be required even if the WCA-3 and the C-11 were found to be the same body of water:

> QUESTION: . . . do you think that if it — if — if it is established that — that this is the same water body, these pumps would be ok without permitting.
>
> MR. LEHTINEN: No, your honor, because . . .
>
> QUESTION: I thought so . . .

(Tr. at 37).

* * *

> QUESTION: But you say this doesn't matter anyway. You wouldn't care if it was the same

> water body. That isn't — that isn't what you are arguing.
>
> MR. LEHTINEN: We do argue that [if] it is the same water body and you pump it substantially upstream. You would also need a permit.
>
> QUESTION: Right, right.

(Tr. at 43-44).

Relying on *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1992), the Tribe's counsel explained that whether the WCA-3 and the C-11 are considered to be one body of water (i.e., hydrologically connected) or not is irrelevant because water from the C-11 naturally flows in an easterly direction — away from WCA-3. (Tr. at 37-38). As the *Dubois* Court explained:

> The [] 'hydrological connectedness' proposal ignores a fundamental fact about water: the direction of flow. It is true that Loon Pond and the East Branch of the Pemigewasset River are "hydrologically connected" in the sense that water from the pond flows *down* and eventually empties into the River. But water from the East Branch certainly does not flow *uphill* into Loon Pond, carrying with it the pollutants that have undisputedly accumulated in the East Branch water from some of the other sources of water entering the East Branch from upstream. Under such circumstances, defendants cannot credibly

> argue that these water bodies are so related that the transfer of water *from* the East Branch *to* Loon Pond is not an "addition" of water from one of the "waters of the United States" to another.

Dubois, 102 F.3d at 1298.

In its brief, the Tribe consistently argued that permits were required because "the S-9 pump station reverses the natural flow, backpumps 'against a gradient' or 'against what would flow naturally the other direction, or another direction,' and disposes the polluted water to the west, where it would not have flowed otherwise." (Resp. Br. at 8); (*see also* Resp. Br. at 12, 17 & 24); (*see also* Br. of Friends of the Everglades at 5 & 13). Accordingly, the Tribe did not, and has never, conceded that permits would not be required if it is determined that the C-11 and the WCA-3 are one, interconnected, body of water. The Court should correct the Opinion so that there is no confusion on remand.[2]

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2. The Court also states in *dicta* that:

> After reviewing the full record, it is possible that the District Court will conclude that C-11 and WCA-3 are not meaningfully distinct water bodies. If it does so, then the S-9 pump station will not need an NPDES permit.

SFWMD, 124 S. Ct. at 1547. To the extent this *dicta* was predicated on the Opinion's statement that the Tribe concedes that no permits would be required if the C-11 and WCA-3 are the same body of water, this language should be corrected because there was no such concession. Whether or not predicated on that assumption, the *dicta* should be corrected because it is confusing. Backpumping and discharging surface water containing pollutants from downstream

(Cont'd)

2. The Decision Should Be Corrected To Reflect That The Tribe Does Defend The Decisions Of The Lower Courts That The C-11 And The WCA-3 Are Distinct Because The Transfer Of Water From The C-11 Into The WCA-3 Would Not Occur But For The S-9 Pump.

The Opinion also states that the district court applied a test for determining whether the C-11 and the WCA-3 are distinct water bodies which "neither party defends; it determined that C-11 and WCA-3 are distinct 'because the transfer of water or its contents from C-11 into the Everglades would not occur naturally.'" *SFWMD*, 124 S. Ct. at 1546. This statement is mistaken with respect to the Tribe's position.

The Tribe vigorously defends the district court's view that a permit is required because the transfer of surface water pollutants from the C-11 to the WCA-3 would not occur naturally. (Resp. Br. at 8, 12, 17 & 24); (*see also* Br. of Friends of the Everglades at 5 & 13). The Tribe did not otherwise explicitly defend the district court's application of this test for distinguishing the two water bodies because the District simply did not challenge that test in its Petition to this Court. (*See* Pet. Br. at 46-49). Indeed, it would have been futile for the District to do so because the undisputed record evidence

---

(Cont'd)

sources into pristine areas upstream would require a permit even if the stream is the same hydrologically because it would involve the discharge of pollutants. Although the Court recognized this difference by using the term "meaningfully distinct" water bodies and "cause in fact," the *dicta* does not expressly set forth the criteria for establishing the "same body of water" test.

is that, absent the operation of the S-9 pumps, water from the C-11 would not naturally enter the Everglades Water Conservation Area:

> Water in the C-11 canal could occasionally, under extreme hydrologic conditions, flow from east to west. However, it would *not naturally* enter the Everglades Protection Area without the operation of the S-9 pump station.

(J.A. at 193) (emphasis added). As the Eleventh Circuit explained, "[n]either party disputes that, without the operation of the S-9 pump station, the polluted waters from the C-11 Canal would not normally flow [west] into the WCA-3A." (Petition at 8a).[3]

---

3. The Tribe clearly stated in its brief that the lower courts

> correctly found that Petitioner's discharge of pollutants from the large pipes of the S-9 pump station was not a remote 'but for' cause of the pollutants reaching the Everglades Protection Area but instead it was the most immediate cause of the pollutants entering that area and as such constituted an 'addition'.

(Tribe's Br. at 24); (*see also* Br. of Friends of the Everglades at 9).

Appendix

CONCLUSION

For the foregoing reasons, this Court should grant rehearing.

Respectfully submitted,

DEXTER W. LEHTINEN
Counsel of Record
JUAN M. VARGAS
CLAUDIO RIEDI
LEHTINEN, VARGAS
& RIEDI, P.A.
7700 North Kendall Drive
Suite 303
Miami, FL 33156-7559
(305) 279-1166

SONIA ESCOBIO O'DONNELL
RICHARD J. OVELMEN
ENRIQUE D. ARANA
TODD M. FULLER
JORDEN BURT LLP
777 Brickell Avenue
Suite 500
Miami, FL 33131

DIONÈ C. CARROLL
In House General Counsel
MICCOSUKEE TRIBE OF INDIANS
P.O. Box 440021
Tamiami Station
Miami, FL 33144

Counsel for Respondent
Miccosukee Tribe of Indians of Florida

Supreme Court, U.S.
FILED
NOV 23 2005
OFFICE OF THE CLERK

No. 04-1527

IN THE

Supreme Court of the United States

S.D. WARREN COMPANY,
Petitioner,

v.

MAINE BOARD OF ENVIRONMENTAL PROTECTION,
Respondent.

On a Writ of Certiorari to the Supreme Judicial Court of Maine

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS AND FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS IN SUPPORT OF PETITIONER

DUANE J. DESIDERIO
THOMAS JON WARD
FELICIA K. WATSON
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200

VIRGINIA S. ALBRECHT
Counsel of Record
KARMA B. BROWN
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

KATHY ROBB
HUNTON & WILLIAMS LLP
200 Park Avenue
New York, NY 10166-0136
(212) 309-1000

November 23, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does the mere flow of water through an existing dam constitute a "discharge" under Section 401, 33 U.S.C. § 1341, of the Clean Water Act, despite this Court's holding last year in *Miccosukee* that a discharge requires the addition of water from a distinct body of water?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE DECISION BELOW CREATES A NEW "PRIVATE CONTROL" TEST THAT SUBVERTS THE CLEAN WATER ACT'S REQUIREMENT THAT A "DISCHARGE" INCLUDE AN "ADDITION."	4
II. UNDER THE CLEAN WATER ACT, THE TERM "DISCHARGE" IS DEFINED TO INCLUDE "ADDITION."	6
III. *MICCOSUKEE* INSTRUCTS THAT THE TRANSFER OF WATER IS NOT AN "ADDITION" UNLESS WATER IS TRANSFERRED BETWEEN TWO "MEANINGFULLY DISTINCT" WATER BODIES	8
IV. THE CASES CITED BY THE SUPREME JUDICIAL COURT OF MAINE DO NOT SUPPORT THE "PRIVATE CONTROL" TEST	10
A. "Private Control" of Water Does Not Make a "Redeposit" a "Discharge."	10
B. Mere Flow of Water Through a Dam Is Not an "Addition."	12
C. There Is No "Addition" in a Transfer Between Two Water Bodies Unless New Constituents Are Introduced into the Receiving Water	13

TABLE OF CONTENTS—Continued

Page

V. THE CLEAN WATER ACT WILL CONTINUE TO REGULATE "DISCHARGES" NOTWITHSTANDING THIS COURT'S REJECTION OF THE "PRIVATE CONTROL" TEST 15

CONCLUSION 17

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Alabama Rivers Alliance v. FERC, 325 F.3d 290 (D.C. Cir. 2003) 13
Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983) 5, 10, 11, 12
Bettis v. Town of Ontario, 800 F. Supp. 1113 (W.D.N.Y. 1992) 7
Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001) 15
Dubois v. U.S. Dep't of Agric., 102 F.3d 1273 (1st Cir. 1996), *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 521 U.S. 1119 (1997) 6, 13, 14
International Paper Co. v. Ouellette, 479 U.S. 481 (1987)..... 7
National Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399 (D.C. Cir. 1998).....7, 11, 12
National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988) 12, 13
National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 12, 13
North Carolina v. FERC, 112 F.3d 1175 (D.C. Cir. 1997), *cert. denied* 522 U.S. 1108 (1998) .. 8, 13
Rueth v. U.S. EPA, 13 F.3d 227 (7th Cir. 1993).... 7
Salt Pond Assocs v. U.S. Army Corps of Eng'rs, 815 F. Supp. 766 (D. Del. 1993) 6
Save Our Cmty. v. U.S. EPA, 971 F.2d 1155 (5th Cir. 1992)..... 6
South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004)..... *passim*
United States v. Lambert, 589 F. Supp. 366 (M.D. Fla. 1984) 6

TABLE OF AUTHORITIES—Continued

STATE CASES — Page

S.D. Warren Co. v. Bd. of Envtl. Prot., 868 A.2d 210 (Me. 2005), *cert. granted in part*, 126 S. Ct. 415 (2005) ..... *passim*

FEDERAL STATUTES

33 U.S.C. § 1251(a) 6
33 U.S.C. § 1311 7
33 U.S.C. § 1341(a)(1) 5
33 U.S.C. § 1342 7
33 U.S.C. § 1344 7
33 U.S.C. § 1362(6) 7
33 U.S.C. § 1362(12) 5, 8
33 U.S.C. § 1362(16) 8
33 U.S.C. § 1362(19) 7

MISCELLANEOUS

Ann R. Klee, General Counsel, and Benjamin H. Grumbles, Assistant Administrator for Water, U.S. Environmental Protection Agency, *Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers* (Aug. 5, 2005), *available at* http://www.epa.gov/ogc/documents/water_transfers.pdf 9

IN THE

Supreme Court of the United States

No. 04-1527

S.D. WARREN COMPANY,
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v.

MAINE BOARD OF ENVIRONMENTAL PROTECTION,
Respondent.

On a Writ of Certiorari to the Supreme Judicial Court of Maine

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS AND FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The National Association of Home Builders ("NAHB") and the Foundation for Environmental and Economic Progress ("FEEP") have received the parties' written consent to file this brief as *amici curiae* in support of the petitioners. The letters of consent have been filed with the Clerk of the Court.[1]

[1] Pursuant to Rule 37.6 of this Court, *amici* state that their counsel authored this brief and *amici* paid for it. This brief was not written in whole or part by counsel for a party, and no one other than *amici* made a monetary contribution to its preparation.

NAHB represents over 205,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial, and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. Many of NAHB's members own and develop property. NAHB is therefore concerned with any judicial decision that affects the regulation of land development, including the appropriate jurisdictional reach of the Clean Water Act ("CWA" or "Act"). NAHB has participated in most of this Court's cases construing the reach of the CWA, as well as cases involving government regulation of the use and development of land.[2]

FEEP, established in 1989, is a national coalition of large land-holding companies founded to advance balanced federal

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[2] NAHB has been before the Court as an *amicus curiae* or as "of counsel" representing the interests of property owners in numerous cases, including *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); and *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). NAHB and FEEP are also submitting *amici* briefs in two CWA cases now pending before the Court, *United States v. Rapanos* and *Carabell v. U.S. Army Corps of Engineers*, consolidated case Nos. 04-1034 and 04-1384.

environmental law and policy regarding the use and development of private land. FEEP members own property in forty-four states and frequently must obtain permits under the CWA to manage or develop land.

The central issue in this case—what activity constitutes an "addition" under the CWA for purposes of defining a regulable "discharge" under the Act—is critical in determining the scope of authority of the United States Army Corps of Engineers ("Corps") and the United States Environmental Protection Agency ("EPA") (collectively, the "Agencies") to require *Amici's* members to obtain permits for their projects to provide housing and build communities for the Nation's citizens. *Amici* submit that the Agencies often compel our members to obtain CWA permits for activities that are not properly regulable under the Act.

SUMMARY OF ARGUMENT

The Supreme Judicial Court of Maine's ("SJC") decision in *S.D. Warren* is a radical one. It holds that "water that has left its natural state and has been subjected to man-made control constitutes an 'addition' upon its return to the same navigable waterway." *S.D. Warren Co. v. Bd. of Envtl. Prot.*, 868 A.2d 210, 217 (Me. 2005), *cert. granted in part*, 126 S. Ct. 415 (2005). The SJC posits that the moment water passes through a dam it is subject to "private control" and thus loses its status as "waters of the United States." *Id.* at 216. The subsequent "redeposit" of waters that have "lost their status as waters of the United States" results in an "addition" to the "waters of the United States," which constitutes a discharge. *Id.* In reaching this conclusion, the court makes two fundamental errors.

First, the SJC's holding ignores this Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) ("*Miccosukee*"), which held that movement of water within a single water body is not

an addition. By premising CWA jurisdiction on "private control" rather than an "addition" to a "meaningfully distinct" water body, *id.* at 112, the SJC improperly expands the CWA.

Second, the SJC misconstrues decades of settled case law defining "discharge of a pollutant" and sharply limiting the circumstances in which a "redeposit" of indigenous waters can be deemed an "addition." No case relied on by the SJC holds that water flowing through a run-of-river dam constitutes a "discharge." An "addition" of some kind is required to trigger the permit and water quality certification requirements under the CWA.

If water is stirred by a spoon, pushed by an oar, or splashed by a hand, the water could be said to fall within "private control." But such movements of water could not be "additions" and thus "discharges" within the meaning of the CWA.

Requiring S.D. Warren to obtain a water quality certification for the mere movement of water within a single water body exceeds the reach of the Act. Congress did not set out to regulate, under the CWA, the millions of land owners, vessel operators, water suppliers, and others who simply move water in the course of their activities but discharge nothing "into" that water. Rather, it chose to regulate discharges—additions—into the nation's waters. The holding must be reversed.

ARGUMENT

I. THE DECISION BELOW CREATES A NEW "PRIVATE CONTROL" TEST THAT SUBVERTS THE CLEAN WATER ACT'S REQUIREMENT THAT A "DISCHARGE" INCLUDE AN "ADDITION."

S.D. Warren ("Warren") owns and operates five contiguous hydroelectric dams on the Presumpscot River in

Cumberland County, Maine. *S.D. Warren Co. v. Bd. of Envtl. Prot.*, 868 A.2d 210, 213 (Me. 2005), *cert. granted in part*, 126 S. Ct. 415 (2005). The projects operate in the run-of-river mode. *Id.* This means that "the outflow of the project is approximately equal to the inflow on an instantaneous basis." *Id.* n.1.

In 2000, 2001, and 2002, as part of its relicensing with the Federal Energy Regulatory Commission ("FERC"), Warren filed applications, under protest, for water quality certification pursuant to Section 401 of the CWA. *Id.* at 213. Section 401 requires any applicant for a Federal license or permit to conduct any activity, which "may result in any discharge into the navigable waters," to provide the licensing or permitting agency with a certification from the state in which that discharge may occur. 33 U.S.C. § 1341(a)(1).

In April 2003, the Maine Department of Environmental Protection ("DEP") approved water quality certification for the continued operation of Warren's projects, subject to a number of conditions. 868 A.2d at 213. Warren appealed, administratively and within state courts, arguing, among other things, that its operation of the dams does not cause a discharge, and therefore Section 401 water quality certification is not required. *Id.* The DEP decision was upheld at all levels, *id.*, and now this Court has granted certiorari to review the decision of the SJC.

The SJC affirmed the lower court decision. *Id.* at 220. Recognizing that "[a]n 'addition' is the fundamental characteristic of any discharge," *id.* at 215, the SJC concludes that the operation of Warren's dams does result in an addition:

> When a substance is removed from a navigable body of water and then redeposited into that same body of water it constitutes a discharge pursuant to section 502(12), 33 U.S.C.A. § 1362(12). *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) ("The word 'addition' as used in the definition of the

> term, 'discharge,' may reasonably be understood to include 'redeposit.'").

Id. Summing up, the court concludes:

> When "water leaves the domain of nature and is subject to *private control* rather than purely natural processes . . . it has lost its status as waters of the United States." *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1297 (1st Cir. 1996). Because these waters have lost their status as *waters of the United States*, when they are redeposited into the natural course of the river it results in an addition to the *waters of the United States.*

Id. (emphasis on "private control" added).

As *amici* will discuss below, the SJC's new "private control" test is inconsistent with the plain language of the Act and unsupported by the case law. "Private control" is not determinative of whether there is an "addition" and therefore a "discharge."

II. UNDER THE CLEAN WATER ACT, THE TERM "DISCHARGE" IS DEFINED TO INCLUDE "ADDITION."

Congress did not intend the CWA to regulate any and every activity that could impact navigable waters. Although the goals of the CWA are ambitious (to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters . . . ."), Congress did not prohibit all actions that cause some type of environmental damage to an aquatic resource.[3] 33 U.S.C. § 1251(a). The Act's regulatory scheme

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[3] *Save Our Cmty. v. U.S. Envtl. Prot. Agency*, 971 F.2d 1155, 1162-63 (5th Cir. 1992) (absent a discharge, the destruction of a wetland is not regulated by the CWA); *Salt Pond Assocs. v. U.S. Army Corps of Eng'rs*, 815 F. Supp. 766, 778 (D. Del. 1993) ("[T]he reach of the CWA extends only to the *discharge* of pollutants into navigable waters . . . ."); *United States v. Lambert*, 589 F. Supp. 366, 373 (M.D. Fla. 1984) (excavation of lake not a violation of the CWA).

is narrower: It addresses water pollution by regulating actions that "discharge" or "add" "pollutants." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 (D.C. Cir. 1998).

The term "pollutant" is inextricably tied to discharges. A substance meets the Act's definition of "pollutant" only if it is "discharged into water." 33 U.S.C. § 1362(6). Water itself is not a pollutant. *Bettis v. Town of Ontario,* 800 F. Supp. 1113, 1119 (W.D.N.Y. 1992). The statutory term "pollution," by contrast, is much broader and is not tied to discharges. "The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). Congress addressed "pollution" through a host of non-regulatory programs. The regulatory program is carefully targeted: It prohibits the discharge of pollutants through point sources into navigable waters except in compliance with permits issued in accordance with the CWA. *Id.* at. § 1311.[4]

Section 402 provides one exception to the discharge prohibition, authorizing EPA and delegated States to issue permits for discharges of pollutants, such as industrial and municipal waste. *Id.* at § 1342. Section 404 is another exception to the discharge prohibition, empowering the Corps to issue permits for the "discharge of dredged or fill material into the navigable waters." *Id.* at § 1344.

The existence of a "discharge" is the critical, deciding factor in determining whether an activity is regulable under the Act. The term "discharge" by itself is defined by

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[4] *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987) ("One of the primary features of the [CWA is] a federal permit program designed to regulate the discharge of polluting effluents."); *Rueth v. U.S. EPA*, 13 F.3d 227, 229 (7th Cir. 1993) ("To achieve the purposes of the Act, Congress prohibited discharge of any pollutants, including dredged or other fill material, except in accordance with the Act.").

reference to "discharge of a pollutant." *Id.* at § 1362(16) ("'[D]ischarge' when used without qualification includes a discharge of a pollutant"). The term "discharge of a pollutant," in turn, "means . . . any addition of any pollutant to navigable waters from any point source . . . ." *Id.* at § 1362(12). As the U.S. Court of Appeals for the District of Columbia Circuit has observed, this statement of inclusion provides "the nearest evidence we have of definitional intent by Congress. . . . ." *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998).

> It would seem to us apparent that since Congress meant "discharge" to *include* "discharge of a pollutant" then Congress intended the word "discharge" to be defined in the *inclusive* use consistently with the *included* use. Therefore, if "discharge of a pollutant" requires addition, then the inclusive understanding of "discharge" also requires an addition.

Id. at 1187 n.4 (emphasis added).

III. *MICCOSUKEE* INSTRUCTS THAT THE TRANSFER OF WATER IS NOT AN "ADDITION" UNLESS WATER IS TRANSFERRED BETWEEN TWO "MEANINGFULLY DISTINCT" WATER BODIES.

The SJC found that the Presumpscot River water lost its status as "waters of the United States" when it passed into private control (through the dam) and then became an "addition" when it was "redeposited" into the very same river at the same flow on the other side of the dam. 868 A.2d at 215-16.

A fundamental flaw in the SJC's decision is its failure to address this Court's holding in *Miccosukee*. In *Miccosukee*, the Court considered what constitutes an "addition" in the context of Section 402 of the CWA, where water was pumped from a canal to a water conservation area sixty feet away. 541 U.S. at 100, 104-05. This Court confirmed that a

"discharge of a pollutant" occurs only when the water body receiving the water is "meaningfully distinct" from the water body that was the source of the water. *Id.* at 112. The Court further suggested that removing water and then returning it to the same water body does not constitute an "addition" of a pollutant under Section 402. *Id.* Thus, if the canal and the water conservation area are not "meaningfully distinct" water bodies, the pumping of water from one location to another would not "add" anything to the receiving water and there is no discharge. *Id.*

After this Court's decision in *Miccosukee,* EPA issued an "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers." Memorandum from Ann R. Klee, General Counsel, and Benjamin H. Grumbles, Assistant Administrator for Water, U.S. EPA, to Regional Administrators (August 5, 2005), *available at* http://www.epa.gov/ogc/documents/water_transfers.pdf. The Agency Interpretation defines "water transfers" as "any activity that conveys or connects navigable waters (as that term is defined in the CWA) without subjecting the water to intervening industrial, municipal, or commercial use." *Id.* at 1. EPA states:

> We emphasize, for purposes of clarity, that a water transfer occurs between two "waters of the United States." Accordingly, the movement of water through a dam is not a water transfer because the dam merely conveys water from one location to another within the same waterbody *(although the movement of water through a dam also does not require an NPDES permit because no "addition" has occurred).*

Agency Interpretation at 18 n.18 (emphasis added).

It is undisputed that the water above, below, and within each dam of the S.D. Warren project is part of the same body of water, the Presumpscot River. 868 A.2d at 213. If merely controlling water constituted an "addition" resulting in a

"discharge" under the CWA, then anyone who moved water from one place to another, even if the water was not a waste product and the controller introduced no new substances of any kind to the water, would need a permit or water quality certification. There is no support in the Act for such an interpretation and the SJC cites none.

IV. THE CASES CITED BY THE SUPREME JUDICIAL COURT OF MAINE DO NOT SUPPORT THE "PRIVATE CONTROL" TEST.

The SJC pointed to "private control" as decisive to its conclusion that there was an "addition" to the Presumpscot River. 868 A.2d at 215-16. No case suggests, however, that private control is an "addition." If control were the determining factor, virtually any movement of water—rowing a boat, skipping a stone—would be deemed a discharge under the CWA.

A. "Private Control" of Water Does Not Make a "Redeposit" a "Discharge."

In its analysis of what constitutes a "discharge," the SJC cites the observation made by the U.S. Court of Appeals for the Fifth Circuit in *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983), that "[t]he word 'addition,' as used in the definition of the term, 'discharge,' may reasonably be understood to include 'redeposit.'" 868 A.2d at 215 (quoting *Avoyelles*, 715 F.2d at 923). The SJC relies on that observation to support the proposition that a "redeposit" of river water, back to the same river from which it originated, constitutes a "discharge." *Id.*

The SJC seems to be saying that a redeposit is *per se* a discharge. But that is reading more into *Avoyelles* than the Fifth Circuit said. That a redeposit *can* be an addition does

not mean a redeposit is *always* an addition.[5] In *Avoyelles*, the Fifth Circuit held that a large-scale mechanized landclearing project in Louisiana, where stumps and ashes from forested trees were placed in sloughs to level the land, constituted a discharge of fill material. 715 F.2d at 901.

Indeed, the U.S. Court of Appeals for the District of Columbia Circuit rejected an agency rule that would have treated all redeposits as "discharges." *Nat'l Mining Ass'n*, 145 F.3d 1399 (D.C. Cir. 1998). The challenged rule would have regulated "*any* redeposit," but the court distinguished *Avoyelles* and held that the Agencies' rule "outruns [their] statutory authority." *Id.* at 1405. "[T]here can be [no] addition of [a pollutant] when there is no addition of material." *Id.* at 1404. In fact, not all redeposits are discharges because the CWA defines the term "discharge" as an "addition," and

> the straightforward statutory term "addition" cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition of material, it cannot be a discharge. . . . In fact the removal of material *from* the waters of the United States, as opposed to the discharge of material *into* those waters, is governed by a completely independent statutory scheme.

Id. (emphasis added) (citations omitted).

The SJC's reliance on *Avoyelles* is further cast in doubt because it is questionable whether *Avoyelles* survives

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[5] Moreover, contrary to the SJC's holding, the Presumpscot River water was never "redeposited," as it never left the river. Because the river water flows continuously through the dams on the same river, it is erroneous to describe the water as being lifted out, changing control, being redeposited, and then again changing control. Thus, redeposit cases, including *Avoyelles*, are inapposite.

Miccosukee. Is regulation of any "redeposit," as discussed in *Avoyelles*, appropriate, given this Court's holding in *Miccosukee*? *Miccosukee* instructs that a "discharge" occurs when there is an "addition" to a "meaningfully distinct" water body. "Redeposit" does not move water, or material, to a meaningfully distinct water body. *See, e.g., Nat'l Mining Ass'n*, 145 F.3d at 1404 (holding that there can be no "addition" of a pollutant without an addition of material). It simply returns the water to the same water body from which it originated. Therefore, redeposit cannot be an "addition" under *Miccosukee*.

B. Mere Flow of Water Through a Dam Is Not an "Addition."

Moreover, both the U.S. Court of Appeals for the D.C. Circuit and the U.S. Court of Appeals for the Sixth Circuit have recognized that Section 402 permits are not required for operation of dams where there is no addition of a pollutant.

In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), the D.C. Circuit held that no addition of a pollutant occurs where water flowing from a reservoir behind a dam passes through the dam and continues with "dam induced water quality changes" into the stream below because no pollutant is introduced "into water from the outside world." 693 F.2d at 161-175. Because the dam does not "add" a pollutant to that water, its operation does not constitute a "discharge" requiring a Section 402 permit. *Id.* at 175.

The Sixth Circuit took the same approach in *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), where it held that a Section 402 permit is required only where there is an addition of a pollutant from a point source. Finding that the dam "merely transmit[s] the water coming into it, in whatever altered form," *id.* at 586, the Sixth Circuit held that no addition of pollutants occurred

because the facility "merely changes the movement, flow, or circulation" of the water, and the water "never loses its status as water of the United States" during the diversion. *Id.* at 588-89.

The D.C. Circuit and the Sixth Circuit concluded that in order to find the required "addition" that defines a "discharge," something must be introduced into navigable water from the outside world.[6] *Consumers Power*, 862 F.2d at 584-86; *Gorsuch*, 693 F.2d at 174-75.

C. There Is No "Addition" in a Transfer Between Two Water Bodies Unless New Constituents Are Introduced into the Receiving Water.

The common thread from *Miccosukee* and numerous decisions from the federal courts of appeals analyzing the jurisdictional purview of Sections 401, 402, and 404 of the CWA is that the CWA term "discharge" necessarily includes "addition." Mere movement within a single water body is not an "addition" and does not require a permit or water quality certification.

The SJC, however, makes "private control" decisive, citing *Dubois v. U.S. Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 521 U.S. 1119 (1997). "When 'water leaves the domain of nature and is subject to private control rather than purely natural processes . . . it has lost its status as waters

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[6] Consistent with these decisions, the U.S. Court of Appeals for the D.C. Circuit held in *North Carolina v. FERC*, 112 F.3d 1175 (D.C. Cir. 1997), that a *decrease* in the amount of water flowing through a dam is not an "addition" for state certification purposes of Section 401 of the CWA. In *Alabama Rivers Alliance v. FERC*, 325 F.3d 290 (D.C. Cir. 2003), the D.C. Circuit held that an *increase* in the flow of water through a dam is an "addition" that may result in a discharge under Section 401. In each case, whether there was an "addition" was the critical factor, and control was not considered.

of the United States.'" 868 A.2d at 215-16 (quoting *Dubois*, 102 F.3d at 1297). But the SJC takes *Dubois* out of context, overstates the "private control" aspect of *Dubois*, and overlooks the fact that the *Dubois* formulation was conjunctive: "water leaves the domain of nature *and* is subject to private control . . . ." *Dubois*, 102 F.3d at 1297 (emphasis added).

Dubois involved a ski resort operator that pumped water from a polluted river into a less-polluted pond to operate its snowmaking equipment. The First Circuit held that the transfer of polluted water from the East Branch of the Pemigewasset River to a second, distinct, less-polluted water body above, Loon Pond, constitutes an "addition" of pollutants to the destination water body. 102 F.3d at 1299.

The snowmaking activity in *Dubois* could not be less like the water flowing through the run-of-river dam in *S.D. Warren*. In *Dubois*, the water was transferred through snowmaking pipes from the river, used in the commercial snowmaking operation, and then, after its use, dumped in the pond. In *S.D. Warren*, the water runs through the dam in constant motion (the water is not lifted out, processed, and then returned). It does not "leave the domain of nature."[7] 102 F.3d at 1297.

Moreover, nothing in *Dubois* suggests that "control" alone could make water movement an "addition." Instead, the court emphasized that the two bodies of water were distinct and that the river water would never flow naturally to the pond. It was that difference that made the pumping an "addition." *Id.* at 1296-98. Because *S.D. Warren* only involves movement of water within the same water body, and the Presumpscot River, left to its own devices, will naturally flow downstream, the SJC's reliance on *Dubois* is wrong.

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[7] *See supra* note 5.

V. THE CLEAN WATER ACT WILL CONTINUE TO REGULATE "DISCHARGES" NOTWITHSTANDING THIS COURT'S REJECTION OF THE "PRIVATE CONTROL" TEST.

The Court need not be concerned that if it does not accept the SJC's "private control" test, the goals and policies of the CWA will somehow be undermined. The pre-*Warren* case law shows that the CWA will continue to be implemented to its fullest.

Though not cited by the SJC, the U.S. Court of Appeals for the Second Circuit, in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), has concluded that the jurisdictional reach of the CWA extends to the transfer of water where new constituents are added from one unconnected water body to another. In *Catskill Mountains*, a water diversion system was used to deliver drinking water to New York City. The system diverted water from a reservoir through a tunnel and into a creek, which in turn emptied into another reservoir. Under natural conditions, the water from the reservoir would never reach the creek. The Second Circuit held that the conveyance of water containing pollutants from one water body to another distinct, hydrologically unconnected water body constitutes an addition, and thus requires a permit for discharge under CWA Section 402.

The court emphasized that mere recirculation, on the other hand, is not an addition:

> If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot (beyond, perhaps, a *de minimis* quantity of airborne dust that fell into the ladle). In requiring a permit for such a "discharge," the EPA might as easily require a permit for Niagara Falls.

Catskill Mountains, 273 F.3d at 492. And the court found, in *Catskill Mountains*, that a permit was required where an

addition was made, consistent with the comprehensive regulatory provisions of the CWA. Because the S.D. Warren project involves the recirculation of water where nothing is added, there is no discharge.

Merely taking water out of a water body and redepositing that same water into the same water body cannot constitute an "addition." CWA Section 301(a) is triggered by discharges, not control of water. The "private control" test is not necessary to effectuate the goals of the CWA. Decisions interpreting Sections 401, 402 and 404 hold that where an "addition" is made, a permit or water quality certification is required. The test enunciated by the *Miccosukee* Court requires an "addition" of new constituents between "meaningfully distinct" water bodies. The SJC's decision in *S.D. Warren*, which premises CWA jurisdiction on a "redeposit" into a water body that is not "meaningfully distinct," where no "addition" has occurred, is not in keeping with the Act and these decisions.

CONCLUSION

For all of the foregoing reasons, the Maine Supreme Judicial Court's decision should be reversed.

Respectfully submitted,

DUANE J. DESIDERIO
THOMAS JON WARD
FELICIA K. WATSON
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200

VIRGINIA S. ALBRECHT
Counsel of Record
KARMA B. BROWN
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

KATHY ROBB
HUNTON & WILLIAMS LLP
200 Park Avenue
New York, NY 10166-0136
(212) 309-1000

November 23, 2005

Attorneys for *Amici Curiae*
National Association of Home Builders and
Foundation for Economic and Environmental Progress

(8)

No. 04-1527

FILED
JAN - 6 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

S.D. WARREN COMPANY,
Petitioner,

v.

MAINE BOARD OF ENVIRONMENTAL PROTECTION,
Respondent.

On Writ of Certiorari to the Maine Supreme Judicial Court

AMICUS CURIAE BRIEF OF NATIONAL WILDLIFE FEDERATION, *ET AL.*, IN SUPPORT OF THE RESPONDENT

JAMES MURPHY
WETLANDS AND WATER RESOURCES COUNSEL
NATIONAL WILDLIFE FEDERATION
58 State Street
Montpelier, Vermont 05602
(802) 229-0650
Counsel for Amicus Curiae National Wildlife Federation

DAVID K. MEARS
ENVIRONMENTAL AND NATURAL RESOURCES LAW CLINIC
VERMONT LAW SCHOOL
PO Box 300
South Royalton, Vermont 05068
(802) 831-1627
Counsel of Record for Amici Curiae National Wildlife Federation, et al.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. DAMS CAUSE POLLUTION	5
A. Federal And State Agencies Have Concluded That Dams Cause Water Pollution...	10
1. Environmental Protection Agency And State Water Pollution Control Agencies ..	10
2. Federal Energy Regulatory Commission..	13
B. Federal and State Courts Have Concluded That Dams Cause Water Pollution	14
C. S.D. Warren Does Not Dispute That Its Dams Cause Water Pollution	17
II. THE CLEAN WATER ACT AUTHORIZES STATES TO PROTECT WATER QUALITY FROM POLLUTION BY DAMS	18
A. The Plain Language Of Section 401 Authorizes State Water Quality Certifications For Dams	18
B. The Clean Water Act Is Intended To Address Water Pollution From Dams	19
1. Congress Expressed Its Intent To Address Water Pollution From Dams Through The Goals And Structure Of The Act	19

TABLE OF CONTENTS—Continued

Page

2. The Legislative History Of Section 401 Supports A Finding That Congress Intended States To Have The Authority To Address Water Pollution From Dams 21

III. STATE WATER QUALITY CERTIFICATIONS ARE NECESSARY TO ADDRESS POLLUTION FROM DAMS 22

A. Section 401 Authority Over Pollution From Dams Is Critical To State Achievement Of Water Quality Standards 22

B. States Can Make Real Improvements In Water Quality By Addressing The Pollution From Dams In Section 401 Water Quality Certifications 25

CONCLUSION 29

TABLE OF AUTHORITIES

CASES	Page
California v. FERC, 495 U.S. 490 (1990)	24
First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946)	24
Georgia Pacific Corp. v. Vermont Dept. of Envtl. Conservation, 35 E.R.C. 2046 (Vt. Super. Ct. 1991), aff'd 628 A.2d 944 (Vt. 1992), cert den'd 511 U.S. 1141 (1994)	16
National Wildlife Federation v. Consumers Power Company, 862 F.2d 580 (6th Cir. 1988)	16
National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982)	15
National Wildlife Federation v. Gorsuch, 530 F.Supp. 1291 (D.D.C. 1982)	14, 15, 16
Power Authority of State of N.Y. v. Williams, 101 A.D. 2d 659, 475 N.Y.S. 2d 901 (N.Y.A.D. 3d Dept. 1984)	16
Power Authority of State of N.Y. v. Flacke, 94 A.D. 2d 69, 464 N.Y.S.2d 252 (N.Y.A.D. 3d Dept. 1983)	16
PUD No.1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994)	4, 14, 19, 23
S.D. Warren Co. v. Board of Environmental Protection, 868 A.2d 210 (Me. 2005)	17
State of Missouri ex rel. Ashcroft v. Department of the Army, 672 F.2d 1297 (8th Cir. 1982)	15
U.S. ex rel. Tennessee Valley Authority v. Tennessee Water Quality Control Board, 717 F.2d 992 (6th Cir. 1983)	16

TABLE OF AUTHORITIES—Continued

ADMINISTRATIVE DECISIONS — Page

California State Water Resources Control Board, *In the Matter of Water Quality Certification for the Southern California Edison Company Lower Tule River HydroelectricProject*, FERC Project No. 372 (March 5, 2004), available at http://www.waterrights.ca.gov/FERC/LowerTule401%20.pdf 27

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TABLE OF AUTHORITIES—Continued

	Page
U.S. Environmental Protection Agency, Washington Department of Ecology and Spokane Tribe of Indians, *Total Maximum Daily Load for Total Dissolved Gas in Mid-Columbia River and Lake Roosevelt* (June 2004), *available at http://www.ecy.wa.gov.pubs/0403002.pdf*	12
STATUTES	
33 U.S.C. § 1251(a)	9
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33 U.S.C. § 1252(a)	20
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33 U.S.C. § 1313	4, 23, 24
33 U.S.C. § 1313(d)	11, 24, 26
33 U.S.C. § 1313(e)	24
33 U.S.C. § 1314(f)	14
33 U.S.C. § 1314(f)(1) & (2) part (F)	10
33 U.S.C. § 1323	20
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33 U.S.C. § 1341(a)(1)	2, 23
33 U.S.C. § 1341(d)	23
33 U.S.C. § 1342	15
33 U.S.C. § 1362	18
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40 C.F.R. § 131.10 23
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INTEREST OF *AMICI*

The amici curiae listed above are a broad array of national, regional, state and local organizations with a strong and demonstrated interest in protecting our Nation's waters and ensuring the proper implementation of the Clean Water Act (CWA or Act). Throughout the history of the Act, these organizations have collectively pursued this interest at the state and federal levels through testimony before legislatures, participation in administrative actions, and litigation in the courts. These organizations' members seek to protect their use of the Nation's waters for a wide array of purposes including swimming, boating, fishing, hunting, scientific study, drinking water and food supply.[1]

SUMMARY OF ARGUMENT

Dams cause pollution. While they provide many benefits, dams have a significant impact on the water quality of hundreds of thousands of stream and river miles across the United States.[2] In this country, we have built over seventy-nine thousand large dams.[3] Dams are located in every major watershed in the United States and are one of the most

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[1] Pursuant to S. Ct. R. 37.3(a) and 37.6, the undersigned represents that (1) all parties consented to the filing of this brief, (2) no counsel for any party authored this brief in whole or part, and (3) no person or entity other than the above-named amici curiae and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] U.S. National Park Service, *River and Water Facts*, *available at* http://www.nps.gov/rivers/waterfacts.html ("Currently, 600,000 miles of our rivers lie behind an estimated 60,000 to 80,000 dams.").

[3] The U.S. Army Corps of Engineers (Corps) has compiled data on approximately 79,000 large dams (dams are defined by the Corps as "large" if (1) over six feet high with more than fifty acre-feet of storage, (2) over twenty-five feet high with more than fifteen acre-feet of storage, and (3) any dam that poses a significant downstream threat to human lives or property). U.S. Army Corps of Engineers, *National Inventory of Dams*, *available at http://crunch.tec.army.mil/nid/webpages/nid.cfm*.

significant factors affecting the ecological health of the Nation's river systems.[4] The water quality impacts of dams include changes to the physical, chemical and biological characteristics of waters both upstream and downstream of the dams. These changes, defined as "pollution"[5] under the Clean Water Act, are a major obstacle to the maintenance and recovery of the many uses, from recreation to subsistence, the American public makes of our nation's rivers and streams.

For this reason, Congress gave states, tribes and the federal government the authority to address the kinds of water quality impacts created by dams through the Clean Water Act. One of the Act's tools for controlling such impacts is the authority given to states under Section 401(a)(1) to issue or withhold water quality certifications as a pre-condition to the issuance of federal licenses for activities which involve "any discharge" into navigable waters. 33 U.S.C. § 1341(a)(1).[6] The Act does not require the "addition of pollutants" in order to trigger Section 401; the flow of water through a dam is sufficient. A plain reading of the Clean Water Act makes clear that the term "discharge" as used in Section 401 is intentionally broad enough to authorize state water quality certifications for the relicensing of dams like S.D. Warren's.

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[4] Dynesius M. and C. Nilsson, *Fragmentation and Flow Regulation of River Systems In The Northern Third Of The World*, 266 Science 753-762 (November 4, 1994); Graf, W.L., *Dam Nation: A geographic census of American dams and their large-scale hydrologic impacts*, 35(4) Water Resources Research 1305-1311 (April 1999).

[5] "The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19).

[6] Section 401(a)(1) refers to states as the primary implementers of the water quality certification provision. 33 U.S.C. § 1341(a)(1). In some cases, the United States Environmental Protection Agency (EPA), inter-state agencies, and Tribes are authorized to issue water quality certifications. For ease of reference, this brief will refer to "state" authority as a substitute for "federal, tribal and state" authority.

Such dams interfere with the achievement of uses designated in state water quality standards and thereby cause "pollution."

S.D. Warren argues that this Court should ignore Section 401's plain language and instead import new language that creates a gaping hole in the ability of states to protect and restore the water quality of their rivers and streams. To accept S.D. Warren's argument that Section 401 of the Act should not apply to the discharge of water through dams unless there is a "discharge of pollutants" would not only require this Court to misconstrue the language, structure and goals of the Clean Water Act, but to ignore a wealth of widely-accepted scientific literature and federal agency, judicial and legislative findings.

Through the application of Section 401, states are making real progress in protecting and restoring the biological, physical and chemical integrity of those of the Nation's waters impacted by dam pollution. States will, however, be unable to fulfill their congressionally authorized responsibility to protect water quality in the absence of authority to issue water quality certifications. For this reason, this Court should summarily reject S.D. Warren's reading of the Act and affirm the Maine Supreme Judicial Court's decision.

ARGUMENT

The issue before this Court as framed by S.D. Warren is whether Section 401 state water quality certification authority is triggered only where a dam results in a "discharge of a pollutant." The real issue, however, is much broader: whether states have the authority under Section 401 to protect the full range of uses designated under federally approved state water quality standards which are impacted by hydropower dams.

A good starting point for addressing this issue is to ask what Congress meant by its policy "to recognize, preserve and protect the primary responsibilities and rights of States

to prevent, reduce and eliminate pollution." 33 U.S.C. § 1251(b). Looking to the Act, "pollution" is defined as encompassing all human activities that alter the chemical, physical and biological integrity of water. 33 U.S.C. § 1362(19). Consistent with this broad definition and in order to achieve the Act's ambitious policy, Congress authorized states to protect and restore beneficial uses of rivers and streams through the adoption and achievement of water quality standards. 33 U.S.C. § 1313. These standards are a powerful tool for combating pollution because they include not only numerical criteria, but designated uses adopted pursuant to the Act's goal to provide for "the protection and propagation of fish, shellfish and wildlife" and "for recreation in and on the water." 33 U.S.C. §1251(a)(2). As this Court has decided previously, it is the protection of these uses that is at the core of the Act's purpose and goals. *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 716-719 (1994) (*PUD No. 1*).

In recognition that federally licensed activities like hydropower dams may impair designated uses, Congress authorized state water quality certifications through Section 401 in order to protect these uses and achieve water quality standards. Congress used the inclusive term "discharge" in Section 401 to ensure that states would have the opportunity to address the water quality impacts of a wide array of federally licensed activities, including hydropower dams. This Court has already concluded that state water quality certifications issued for dams may include conditions "as necessary to enforce a designated use contained in a state water quality standard." *PUD No. 1* at 723. The validity of this conclusion, apparent from the language of the Act, becomes even clearer in the light of the consensus among scientists, government agencies and the courts that dams such as S.D. Warren's cause pollution and impact designated uses.

I. DAMS CAUSE POLLUTION

As established by well-accepted scientific literature,[7] hydropower dams such as S.D. Warren's present a variety of water quality impacts to river and stream ecosystems as well as to the ponds, lakes, wetlands, estuaries and bays interconnected with the impounded rivers and streams. The type and degree of impact varies for each hydropower project depending upon the type of dam, its manner of operation and the nature of the river or stream system where it is located.[8] The fact that a dam is a "run of the river" dam in which the discharge from the dam is generally equivalent to the inflow into the reservoir above the dam does not eliminate these harms.[9]

When free flowing rivers are impounded behind hydropower dams, they frequently stratify into layers of warmer waters on top and colder, oxygen-deprived waters below, with neither temperature reflecting the natural condition of

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[7] For three compilations of studies and research papers regarding the environmental impacts of dams, *see* (1) U.S. Environmental Protection Agency, *EPA's Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*, Chapter 6, Section VI.B. *available at http://www.epa.gov/nps/MMGI/Chapter6/ch6-6.html*; (2) H. John Heinz III Center for Science, Economics and the Environment, *Dam Removal: Science and Decision Making*, References, 207-221 (2002) available on-line at *http://www.heinzctr.org/NEW_WEB/PDF/Dam_removal_full_report.pdf*; and (3) American Rivers, *American Rivers Dam Removal Toolkit Bibliography, available at http://www.americanrivers.org/site/PageServer?pagename=AMR_content_2d1c.*

[8] Poff, N.L. and D. D. Hart, *How Dams Vary and Why It Matters for the Emerging Science of Dam Removal*, 52(8) Bioscience 659-668 (August 2002), *available at http://rydberg.biology.colostate.edu/poffpubs/Poff2002(BioScience_dams).pdf* (*How Dams Vary*).

[9] *Id* at 661-662 (noting that distinctions between the various operational classes of dams are imprecise and recommending the use of ecological classifications as providing a more useful tool for evaluating the environmental impacts of dams).

the river system.[10] The temperature levels also impact the levels of oxygen in the water below the dam. The amount of oxygen in the water column, in turn, has a dramatic impact on the kinds of organisms that can survive below the dam.[11] The varying temperatures and oxygen levels in the reservoir also affect the water chemistry of the entire system and can cause toxic chemicals such as hydrogen sulfide and ammonia to be released in harmful concentrations.[12]

Another water chemistry impact associated with hydropower dams involves the entrainment or supersaturation of atmospheric gases into the water column occurring when air and water are mixed in a turbine or at a spillway. These gases, such as nitrogen, can remain dissolved in the water downstream from the dam. In their dissolved form, these gases are taken into the circulatory systems of fish and other organisms with gills. As the fish move to different levels of the river, those gases come out of solution, forming bubbles

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[10] Peterson, M.J. et. al., U.S. Department of Energy, *Regulatory Approaches for Addressing Dissolved Oxygen Concerns at Hydropower Facilities*, DOE/ID-11071 (March 2003) at 1-5, *available at* http://hydropower.id.doe.gov/turbines/pdfs/doeid-11071 (*Regulatory Approaches*); *How Dams Vary* at p. 660; McCartney, M.P., C. Sullivan, M.C. Acreman, Center for Ecology and Hydrology, UK, IUCN – The World Conservation Union, *Ecosystem Impacts of Large Dams*, Contributing Paper to the World Commission on Dams, at 21 *further information available at http://www.dams.org* (*Ecosystem Impacts of Large Dams)*; Collier, M., R.H. Webb and J.C. Schmidt, U.S. Geological Survey, *Dams and Rivers: Primer on the Downstream Effects of Dams*, USGS Circular 1126 (1996) at 58, *available at http://pubs.er.usgs.gov/pubs/cir/cir1126* (describing the effect of temperature on fish below the Flaming Gorge dam on the Green River)(*USGS Primer*).

[11] *Id.*

[12] *Regulatory Approaches* at 1.

that can cause a potentially lethal effect similar to the "bends" in scuba divers.[13]

The impoundment of water in reservoirs behind hydropower dams may result in changes to the flow regimes of rivers with significant impacts to downstream aquatic ecosystems.[14] Dams also affect the total volume of water in the river systems below the dams through evaporation and seepage.[15] In addition to reducing habitat for fish and wildlife, evaporation can also affect water quality by increasing salinity.[16] Further, hydropower dams frequently divert water from its natural course to produce power, creating a "bypass reach" just below the dams in which a stretch of the entire stream or river is dewatered, creating even more dramatic reductions in habitat and losses of use.[17]

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[13] Abernathy, C.S., B.G. Amidan, U.S. Department of Energy, *Laboratory Studies of the Effects of Pressure and Dissolved Gas Supersaturation on Turbine-Passed Fish*, DOE/ID-10853 (March 2001) at 2.3-2.5, *available at http://hydropower.id.doe.gov/turbines/pdfs/doeid-10853.pdf*; National Research Council, National Academy of Sciences, *Upstream: Salmon and Society in the Pacific Northwest*, (1996), at 229, *available at http://books.nap.edu/books/0309053250/html/index.html* (*Upstream*).

[14] Poff, L.N. et. al., *The Natural Flow Regime: A Paradigm for River Conservation*, 47(11) Bioscience 769-784 (December 1997), *available at* http://rydberg.biology.colostate.edu/poffpubs/Poff1997%28BioScience_NFR%29.pdf; World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*, (November 2000) at 78-81 *available at http://www.dams.org/* (*Dams and Development*).

[15] *Ecosystem Impacts of Large Dams* at 14, 19-20 (noting estimates that one third of the Colorado River's flow is evaporated from behind dams); *Dam Nation*, at 1308.

[16] *Ecosystem Impacts of Large Dams* at 14; *USGS Primer* at 43.

[17] National Research Council, National Academy of Sciences, *New Strategies for America's Watersheds*, (1999), at 24, *available at http://www.nap.edu/books/0309064171/html/*; for one particularly dramatic example, *see* discussion of the restoration of the bypass reach below Lake

In addition to these impacts, hydropower dams without fish ladders serve as a physical barrier to migrating fish seeking to spawn upstream.[18] Further, fluctuations in river or stream levels can impair fish reproduction by interfering with the spawning habits of fish.[19] Another physical impact of dams is the damage to riparian habitat resulting from the diminished connectivity between the river and adjoining forest. This leads to reduced overbank flooding and the loss of the associated nutrient and sediment input that is essential to the native plant and animal life adapted to floodplain habitats.[20] Conversely, when not impaired by dam operations, the connectivity between the river and forest leads to a direct improvement of water quality due to the utilization of nutrients by plant communities.[21]

In some river systems, the releases from dams of low sediment water may cause channel incision, significantly

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Chelan in Washington by Chelan Public Utility District, *Chelan River (Bypassed Reach) Comprehensive Management Plan, Lake Chelan Hydroelectric Project*, FERC Project No. 637 (December 2001) at 2-4 *available at http://www.chelanpud.org/relicense/study/reports/6149_6.pdf.*

[18] *Upstream* at 231; *Dams and Development* at 82-83; *USGS Primer* at 22 (Snake River dams block salmon migration).

[19] Bednarek, A.T., *Undamming Rivers: A Review of the Ecological Impacts of Dam Removal*, 27(6) Environmental Management 803-814 (June 2001)(concluding that the restoration of an unregulated flow regime by dam removal enhances preferred spawning grounds); *Upstream* at 229 (fluctuations in flow and depth can lead salmon to construct nests in unsuitable places and strand juvenile salmon).

[20] Ligon, F.K., W.E. Dietrich, W.J. Trush, *Downstream Ecological Effects of Dams*, 45(3) Bioscience 183-192 (March 1995); *Dams and Development* at 83-84; *USGS Primer* at 46-53 (sedimentation of the Platte River has dramatically diminished sandhill crane habitat).

[21] Tremolieres, M. , et. al., *Impact of river management history on the community structure, species composition and nutrient status in the Rhine alluvial hardwood forest*. 135 Plant Ecology 59-78 (1998).

changing river bed composition and riparian habitat.[22] The retention of sediment behind dams also has major impacts on downstream estuaries and wetlands.[23] Finally, the dramatic changes by hydropower projects to the ordinary flow regime of rivers can also make it dangerous or even impossible for people to use the rivers below dams for swimming or boating. The U.S. Geological Survey "Primer" on the downstream effects of dams notes that anglers in the Chattahoochee River are swept downstream every year in spite of warning signs and sirens.[24]

Collectively, even in the absence of a discrete discharge of pollutants, the harm attributable to hydropower dams covers the full range of water quality impacts that the Act defines as "pollution." It was this range of impacts that Congress authorized states to address through Section 401 as an important tool for restoring and protecting the chemical, physical and biological integrity of the Nations's waters. 33 U.S.C. § 1251(a). The conclusion that dams harm rivers is not one reached only recently,[25] nor is it a conclusion shared

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[22] *Dams and Development* at 81; *How Dams Vary* at 660; *USGS Primer* at 38-45 (heavy downstream erosion of the Chattahoochee River below Buford Dam as a result of dam releases).

[23] *Upstream* at 234-35 (noting the loss of over 20,000 acres of tidal swamps, 10,000 acres of tidal marshes, and 3,000 acres of tidal flats in the past century from the Columbia River estuary as a result of the accumulation of sediment behind dams).

[24] *USGS Primer* at 42.

[25] A review of bibliographies and reference lists relating to the environmental impacts of dams reveals scientific articles that pre-date the Clean Water Act. *See e.g.* Beiningen, K.T. and W.J. Ebel, *Effect of John Day Dam on dissolved nitrogen concentration and salmon in the Columbia River, 1968*, 99 Transactions Am. Fish. Soc'y 664-671 (1970); Pauley, G.B. and R.E. Nakatani. *Histopathology of "gas bubble" disease in salmon fingerlings*. 24 J. Fish. Res. Board Can. 867-871 (1967); and Westgard, R.L. *Physical and biological aspects of gas-bubble disease in*

only among academics and researchers. This conclusion is one shared by state and federal agencies and by the Courts.

A. Federal and State Agencies Have Concluded That Dams Cause Water Pollution

1. *Environmental Protection Agency And State Water Pollution Control Agencies*

The U.S. Environmental Protection Agency (EPA) and state water pollution control agencies have developed significant expertise in the measurement and evaluation of pollution impacts over the history of the Federal Water Pollution Control Act. These agencies have repeatedly evaluated the impacts of dams and determined that dams impact water quality.

In the 1972 Federal Water Pollution Control Act Amendments, Congress directed EPA to develop guidelines and methods to control pollution from "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams." 33 U.S.C. § 1314(f)(1) & (2) part (F). One year later, in response to this directive, EPA published a report entitled "Control of Pollution from Hydrographic Modifications," EPA Doc. No. 4 03/9 -73-017 (1973). In this report, EPA described the water quality problems caused by dams including lowered dissolved oxygen levels and other impacts. *Id.*

Again indicating Congressional awareness of the pollution created by dams, the 1987 Amendments to the Federal Water Pollution Control Act required EPA to conduct a study of the water quality impacts of dams. Pub.L. No. 100-4, Title V, §524, 101 Stat. 89 (1987). EPA submitted this report to Congress in 1989 and provided an updated account of the substantial adverse water quality impacts from stratification

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impounded adult chinook at McNary spawning channel. 93 Transactions Am. Fish. Soc'y 306-309 (1964).

of impounded water behind dams including "low hypolimnetic dissolved oxygen, increased iron and manganese, eutrophication, hydrogen sulfide, sediment movement, flow regulation, thermal changes, and reaeration denial." U.S. Environmental Protection Agency, *Report to Congress: Dam Water Quality Study*, EPA 506/2-89/002 (March 1989) at v. EPA concludes in this report that "[i]mpoundments can modify the physical, chemical, and biological characteristics of the free-flowing aquatic ecosystem." *Id.* at VII-2.

At the state level, reference to individual state water quality plans submitted to EPA as required under the Act provides additional insights into the kinds of water quality impacts seen by state water pollution control agencies as they evaluate watersheds affected by dams. The plans are developed pursuant to the CWA Section 303 requirement that states develop "Total Maximum Daily Loads" (TMDLs). In these TMDL reports, states must evaluate the sources and levels of pollution into water quality impaired waters. 33 U.S.C. § 1313(d).

A recent TMDL report prepared by the State of Washington and EPA in cooperation with the Spokane Tribe describes the water quality impacts of seven hydropower dams on a segment of the Columbia River. Specifically, the report concludes that these dams are causing violations of the water quality standard for dissolved gas. The implementation plan in the report relies heavily on Section 401 as an important tool for the achievement of the dissolved gas standard through its application to the federally licensed hydropower dams operated by public utility districts:

> The only significant sources of [total dissolved gas] within the TMDL area are the hydroelectric projects. The details of implementation of this TMDL will be developed as the [public utility district] projects on the Mid-Columbia reapply for [Federal Energy Regulatory

> Commission (FERC)] licenses and water quality certifications under Clean Water Act Section 401.

U.S. Environmental Protection Agency, Washington Department of Ecology and Spokane Tribe of Indians, *Total Maximum Daily Load for Total Dissolved Gas in the Mid-Columbia River and Lake Roosevelt*, (June 2004) at x-xi, *available at http://www.ecy.wa.gov/pubs/0403002.pdf.*

In a related TMDL being developed by EPA in conjunction with the States of Idaho, Oregon and Washington, and the Spokane and Colville Tribes, EPA has concluded that hydropower dams are the major cause of water temperature standard violations in the Columbia/Snake River basin. U.S. Environmental Protection Agency, *EPA Region 10 Fact Sheet No. 6*, Columbia/Snake River Problem Assessment for Temperature, Fall 2001, *available at http://yosemite.epa.gov/R10/WATER.NSF/840a5de5d0a8d1418825650f00715a27/a2d0d5ba536f136288256a94006304a4/$FILE/cr%20tmdl%20fs%20%233%209-10.pdf.* As is true for state efforts to address violations of the dissolved gas standard in the Columbia River, the affected states and tribes will need CWA Section 401 authority in order to address the contributions to temperature violations by FERC licensed dams.

On the other coast, the State of Maine has identified the "presence of many dams" as a major cause of water quality impairment in the Salmon Falls River watershed. U.S. Environmental Protection Agency, *EPA-New England's Review of Maine's Salmon Falls/Piscataqua River TMDLs*, November 1999, at 6, *available at http://www.epa.gov/region1/eco/tmdl/assets/pdfs/me/salmonfallsriver.pdf.* In this report, EPA notes its approval of Maine's conclusion that changes to dam operations are necessary in order to achieve water quality standards for dissolved oxygen. *Id* at 7.

The information compiled and developed by these administrative agencies tasked with protecting the nation's water

quality clearly and unequivocally demonstrates that dams, particularly hydropower dams, cause pollution.

2. *Federal Energy Regulatory Commission*

The Federal Energy Regulatory Commission (FERC), which has the primary responsibility for licensing hydropower facilities under the Federal Power Act, has considered the water quality impacts of many dams and likewise has concluded that dams cause pollution. For instance, in holding that the City of Augusta, Georgia was required to seek a Section 401 certification for an existing diversion dam, FERC stated,

> [W]e cannot conclude based on the record here that the operation of the project does not in any way alter the characteristics of the water that flows over the diversion dam. Water passing through the project impoundment may be changed in temperature or in chemical composition. Also, the act of flowing over the dam may alter certain characteristics of the water, such as its dissolved oxygen content.

City of Augusta, Georgia, 109 FERC ¶ 61,210, 62,006-62,007 (November 2004) (Order on Reconsideration). In another decision with an extensive discussion of the applicability of Section 401 to a dam in Maine, FERC noted the potential water pollution from dams:

> Depending on how they are operated, dams and the reservoirs they impound can result in a discharge of water that is warmer or colder, more or less turbid, or containing greater or lesser amounts of dissolved gases or sediments, including various contaminants, than would otherwise be the case for the body of water receiving the discharge.

FPL Energy Maine Hydro LLC, 111 FERC ¶ 61,104 (April 2005) (Order Denying Rehearing).

These FERC decisions confirm an understanding shared by other federal agencies with a role in evaluating or managing the environmental impacts of dams. *See e.g.* U.S. Fish and

Wildlife Service, *Hydropower: Environmental Issues*, at *http://www.fws.gov/habitatconservation/hydro_issues.pdf* (describing impacts of dams on temperature, dissolved oxygen, dissolved nitrogen, fish passage, and riparian habitat); Tennessee Valley Authority, *Water Quality* at *http://www.tva.gov/environment/water/index.htm* (discussing efforts of the Authority to address low dissolved oxygen and inadequate flows); and U.S. Department of Energy, *Hydropower: Environmental Issues and Mitigation*, at *http://www.eere.energy.gov/RE/hydro_enviro.html* (noting problems with hydropower dams including fish passage, low dissolved oxygen and inadequate flows).

B. Federal And State Courts Have Concluded That Dams Cause Water Pollution

This Court's decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), recognizes the impacts of dams on water quality. Discussing the proposed hydropower dam on the Dosewallips River, the Court noted,

> [A] sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery.

Id. at 719. In finding that the proposed dam's impacts on flows were within the purview of state regulation under Section 401, the Court described Congress' "broad conception of pollution" as evincing a concern with the "physical and biological integrity of water." *Id.* Further, the Court cited Section 304(f) of the Act, 33 U.S.C. § 1314(f), as an express recognition by Congress that "water 'pollution' may result from 'changes in the movement, flow, or circulation of any navigable waters . . . , including changes caused by the construction of dams." *Id.* at 720.

After reviewing considerable evidence and scientific testimony in *National Wildlife Federation v. Gorsuch*, 530 F.Supp.

1291, 1295 (D.D.C. 1982), 693 F.2d 156, 161 (D.C. Cir. 1982), a federal district court and court of appeals both concluded that dams have significant water quality impacts. While dealing with the applicability of Section 402, 33 U.S.C. § 1342, not Section 401,[26] the *Gorsuch* decisions are highly relevant to this Court's evaluation of whether Section 401 applies because of the courts' thorough description of the water quality impacts of dams. In its decision, the D.C. Circuit summarizes several of the major impacts dams can have on water quality: (1) low dissolved oxygen; (2) dissolved minerals and nutrients; (3) temperature changes; (4) sediment; (5) supersaturation (dissolved gas); and (6) a variety of other water quality impacts including indirect negative impacts on groundwater and reductions in stream flow and waste assimilation capacity. 693 F.2d at 161-165. Both courts' observations were carefully supported by a detailed record developed over the course of a three-day trial, including testimony by experts and EPA documents such as the 1973 EPA report "Control of Pollution from Hydrographic Modifications," EPA Doc. No. 4 03/9 -73-017 (1973).

Other circuits have endorsed the legal and factual analysis of the *Gorsuch* holding that a Section 402 NPDES permit is not required when there is no "discharge of pollutants" from a dam, but these courts have also implicitly acknowledged the water quality impact of dams. *See e.g. State of Missouri ex rel. Ashcroft v. Department of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982) (not questioning that the operation of the dam

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[26] The *Gorsuch* case dealt with an issue not presented in this case: whether dams can be regulated under CWA Section 402 as a point source discharge requiring a National Pollutant Discharge Elimination System (NPDES) permit. Section 402, by its express terms, applies only to "discharges of pollutants." 33 U.S.C. § 1342. In *Gorsuch*, the D.C. Circuit deferred to EPA's decision not to regulate dams under Section 402 but expressly left open the question of whether water pollution from could be addressed by states through other provisions of the Act. *Gorsuch*, 693 at 182-183.

caused "soil erosion and reduction of oxygen"); *U.S. ex rel. Tennessee Valley Authority v. Tennessee Water Quality Control Board*, 717 F. 2d 992, 1000 (6th Cir. 1983) (acknowledging that dams might be subject to state or local regulation as nonpoint sources of pollution); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 586 (6th Cir. 1988) (noting that "any resulting pollution in the form of entrained fish is, as in *Gorsuch*, an inherent result of dam operation.").

Many state courts have also concluded that dams impact water quality. In *Power Authority of State of N.Y. v. Williams*, after reviewing a voluminous record, the New York Supreme Court, Appellate Division, upheld a state Section 401 certification on the basis that the hydropower dam at issue would violate state water quality standards. 101 A.D.2d 659, 475 N.Y.S. 2d 901 (N.Y.A.D. 3d Dept. 1984). This conclusion was supported by the record developed in a prior decision in which the court provided a thorough discussion of the water quality impacts of the dam's operation. The court found these impacts included increased turbidity, variations in flow resulting in disruption to fish spawning and food supply, and increased temperature. *Power Authority of State of N.Y. v. Flacke*, 94 A.D.2d 69, 73-75, 464 N.Y.S.2d 252, 255-257 (N.Y.A.D. 3d Dept. 1983).

Similarly, in *Georgia Pacific Corp. v. Vermont Dept. of Envtl. Conservation*, 35 E.R.C. 2046, 2050-51 (Vt. Super. Ct. 1991) aff'd 628 A.2d 944 (Vt. 1992) cert den'd 511 U.S. 1141 (1994), a Vermont Superior Court judge upheld a Section 401 certification issued by the state water pollution control agency for the relicensing of an existing hydropower dam on the basis that the certification conditions were necessary to protect the aesthetic and recreational value of the river. Specifically, the court upheld the state's water quality certification as necessary to maintain dissolved oxygen levels, to "restore and preserve the Connecticut River as a fish

habitat," and to "safeguard the aesthetic appeal of the river to the numerous persons who use the river for recreation." *Id.*

C. S.D. Warren Does Not Dispute That Its Dams Cause Water Pollution

There is ample evidence in the record to support the conclusion that the operation of S.D. Warren's dams results in the pollution of the Presumpscot River as defined by the Act. The Maine Board of Environmental Protection determined that:

> The record in this case demonstrates that Warren's dams have caused long stretches of the natural river bed to be essentially dry and thus unavailable as habitat for indigenous populations of fish and other aquatic organisms; that the dams have blocked the passage of eels and sea-run fish to their natural spawning and nursery waters; that the dams have eliminated the opportunity for fishing in long stretches of river; and that the dams have prevented recreational access to and use of the river.

Joint Appendix (JA) at A-49.

The Board also found that,

> [T]he Dundee and Gambo dams clearly cause or contribute to the current violation of dissolved oxygen standards in several parts of the Presumpscot River. Were these dams not in place and operating in such a way as to reduce natural reaeration, to increase time of travel, to increase water temperature, and to create settling basins for sediments and nutrients, dissolved oxygen standards would be met in the Gambo, Little Falls, and Sacarappa impoundments, particularly under dry weather conditions when the effect of non-point source pollution on dissolved oxygen levels is minimal.

JA at A-51. S.D. Warren did not challenge these findings below nor does it do so here. JA at A-12; *S.D. Warren Co. v. Board of Environmental Protection*, 868 A.2d 210, 218 (Me. 2005).

The State of Maine's findings are consistent with the broad consensus of the scientific community, government agencies and the courts that dams impact water quality.

II. THE CLEAN WATER ACT AUTHORIZES STATES TO PROTECT WATER QUALITY FROM POLLUTION BY DAMS

A. The Plain Language Of Section 401 Authorizes State Water Quality Certifications For Dams

The language of Section 401 is intentionally broad, applying the requirement for an applicant for a federal license to obtain a water quality certification in order to "conduct *any* activity *including*, but not limited to, the construction *or* operation of facilities, which *may* result in *any* discharge into the navigable waters." 33 U.S.C. § 1341 (emphasis added). Each of the emphasized terms demonstrates Congress' deliberate intent to craft a statute that would reach the widest possible set of federally licensed activities.

Further, when defining this provision's critical term, "discharge," Congress again used broad language: "The term 'discharge' when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16). The use of the term "includes" makes plain that Congress intended the term "discharge," when used "without qualification," as it is in Section 401, to reach a wider set of activities than just those simply introducing or reintroducing pollutants. Each of the other definitions in Section 502 uses the term "means;" the term "discharge" stands alone as the only term defined using the broader term "includes." 33 U.S.C. § 1362.

Contrary to S.D. Warren's position, the term "discharge" does not require the "addition" of a pollutant in order to trigger Section 401. S.D. Warren incorrectly argues that the Act requires "at a minimum, the addition into the water from a point source of something other than the water itself."

Petitioners Brief at 14. The Act's definition of "discharge" however, in contrast to the definition of "discharge of pollutants," makes no reference to the term "addition." 33 U.S.C. § 1362(12), (19). Under an ordinary dictionary definition, "discharge" in the context of dams is best understood to mean "[a] flowing out or pouring forth," and "something that is discharged [or] released." American Heritage Dictionary 4th Edition, *available at http://www.bartleby.com/61/46/D0254600.html*. Nothing in this definition suggests that something must be added to the flow of water out of a dam before it can be considered a "discharge." The operation of dams causes water to flow out of the dams; the dams release impounded water. Accordingly, S.D. Warren's dams discharge into waters of the U.S. and must obtain a water quality certification from the State of Maine pursuant to CWA Section 401.[27]

B. The Clean Water Act Is Intended To Address Water Pollution From Dams

Reading the term "discharge" within the broader context of the Act provides confirmation that Congress intended the term "discharge" in Section 401 to reach activities, such as the operation of S.D. Warren's dams, which impact water quality.

1. *Congress Expressed Its Intent To Address Water Pollution From Dams Through The Goals And Structure Of The Act*

Congress intended that states have broad authority under the Act to address water "pollution." The term "pollution" is used extensively throughout the Act and is defined as "the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water." 33 U.S.C.

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[27] It is also notable that, in *PUD No. 1*, there was no dispute that the Elkhorn Project at issue would result in two possible discharges including "the discharge of water at the end of the tailrace after the water has been used to generate electricity." *PUD No. 1* at 711.

§ 1362(19). In light of the discussion of the water quality impacts of hydropower dams above, there can be no question that dams alter the chemical, physical and biological integrity of water and thus cause "pollution" within the meaning of the Clean Water Act.

In addition to including an expansive definition of "pollution" in the Act, Congress also left numerous indications throughout the statute that it intended the Act's coverage to reach broadly. In the "Goals and Policy" section of the Act, Congress recognized the "responsibilities and rights of states to prevent, reduce and eliminate *pollution*" and specifically stated that federal policy is to support state efforts toward this end through research, technical services and financial aid. 33 U.S.C. § 1251(b)(emphasis added). *See also* 33 U.S.C. 1252(a) (directing EPA to "develop comprehensive programs for preventing, reducing, or eliminating the *pollution* of the navigable waters"); 33 U.S.C. § 1256(a)(authorizing grants to states "for the prevention, reduction, and elimination of *pollution*"); 33 U.S.C. § 1370 (authorizing states to adopt "any requirement respecting control or abatement of *pollution* more stringent than the federal standard."); and 33 U.S.C. § 1323 (requiring federal agencies to meet state requirements for the "control and abatement of water *pollution*.") (emphasis added).

With the Act's heavy emphasis on controlling "pollution" in these provisions, it would be remarkable if Congress had intended to exempt a major source of pollution such as hydropower dams from the state water quality certification requirement of Section 401. Collectively, these provisions demonstrate Congressional intent to capture all sources of pollution within the ambit of the Act. Nothing in the Act suggests that state regulation is limited to only the subset of polluting activities that add discrete particles of contamination to a body of water. In fact, Congress intended the opposite result. The control of "pollution" is a broader task

than just regulating "pollutants." Similarly, the term "discharge" reaches a broader set of activities than the term "discharge of pollutants."

Section 402 covers the subset of polluting activities that involve only the "discharge of pollutants." In order to ensure state authority to address "pollution," Section 401 covers federally licensed activities, otherwise exempt from state regulation, that may cause "any discharge." Only when Section 401 is read in this manner is it possible for states to fulfill the responsibility given to them by Congress "to prevent, reduce and eliminate pollution" through setting and achieving water quality standards.

2. *The Legislative History Of Section 401 Supports A Finding That Congress Intended States To Have The Authority To Require Water Quality Certifications To Address Pollution From Dams*

In light of the plain language of the Act, a review of the legislative history of Section 401 and its precursor, Section 21(b) of the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970), should be unnecessary. With that said, the legislative history of both laws confirms that Congress was concerned with protecting state authority to address a broad array of potential water quality impacts from federally licensed discharges, not just the addition of pollutants. For instance, the House Report discussing Section 21(b) notes that,

> A wide variety of licenses and permits (construction, operating and otherwise) are issued by various federal agencies. Many of them involve activities or operations *potentially affecting water quality*. The purpose of subsection 11(b) is to provide reasonable assurance (as determined by the affected State, States, or the Secretary of the Interior) that no license or permit will be issued by a federal agency for an activity that through inadequate

> planning or otherwise could in fact become a source of *pollution*.

H.R. Rep. No. 127, 91st Cong., 2d Sess. 1970, *reprinted in* 1970 U.S.C.C.A.N. at 2697 (emphasis added). Nothing in this statement suggests any intent to limit the application of Section 21(b) to just those activities that added discrete pollutants to the water. Instead, the mention of activities "potentially affecting water quality" and that could "become a source of pollution" indicate the broad reach Congress intended this provision to have.

Later, in the debate over the Federal Water Pollution Control Act Amendments of 1972, one of the main authors of the Act, Senator Edmund Muskie, argued in support of Section 401 by stating, "[a]ll we ask is that activities that *threaten to pollute* the environment be subjected to the examination of the environmental improvement agency of the state for an evaluation." 117 Cong. Rec. 38,854 (1971), *reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972*, volume 2 at 1388 (emphasis added). Section 401 of the Clean Water Act thus represents nothing less than a clear reflection of Congressional intent that states be given the opportunity to certify whether or not federally licensed projects such as hydropower dams will meet state water quality standards.

III. STATE WATER QUALITY CERTIFICATIONS ARE NECESSARY TO ADDRESS POLLUTION FROM DAMS

A. Section 401 Authority Over Pollution From Dams Is Critical To Achievement Of Water Quality Standards

Recognizing the authority of states to address the water quality impacts of dams through Section 401 is essential to fulfilling the ultimate goal set by Congress and defined by EPA for the states: the protection of the full array of uses by the public, including recreation in and on the water and

the propagation of fish, shellfish and wildlife. 33 U.S.C. § 1251(a)(2); 40 C.F.R. § 131.10. In furtherance of this goal, Congress provided for state adoption of water quality standards and implementation of plans in Section 303 to ensure that this broad range of uses is protected. 33 U.S.C. § 1313. Section 303 can thus be viewed as the foundation upon which much of the Act stands. It is the achievement of the water quality standards toward which all efforts are directed, and against which all efforts are measured.

For this reason, in *PUD No. 1*, 511 U.S. at 712-713, this Court appropriately discussed Section 303 at some length. The Court rejected the dam operator's argument that the State of Washington was not authorized to condition issuance of a Section 401 certification on the protection of designated uses, as opposed to specific numerical criteria, in the state's water quality standards. Looking to "the literal terms of the statute," the Court held in *PUD No. 1* that "a project that does not comply with a designated use of the water does not comply with the applicable water quality standards." 511 U.S. at 714-715. Of particular significance to the Court was the specific requirement in Section 401(a)(1) that states certify, *inter alia*, that the discharge will comply with Section 303. 33 U.S.C. § 1341(a)(1). The Court thus held that states may use Section 401 certifications to protect water quality standards promulgated under Section 303.

For further support, the *PUD No. 1* Court looked to Section 401(d) which authorizes "other limitations" in water quality certifications as necessary to ensure that the activity complies with "any other appropriate requirement of State law" including uses designated in the standards. 33 U.S.C. § 1341(d); *PUD No. 1* at 711-12. This determination, that the Act protects uses, not just numerical criteria, is consistent with the conclusion that Section 401 is intended to give states significant authority to address a broad spectrum of harms to waters of the United States such as those caused by hydropower dams.

Reading further into Section 303 demonstrates the importance of viewing state water quality certification authority under Section 401 as an integral part of the Clean Water Act's comprehensive net for capturing sources of pollution. Section 303 requires that states develop and implement plans for recovering any river or stream segments that are not meeting water quality standards. 33 U.S.C. § 1313. Subsection (d) requires states to account for all of the sources of pollution into any such impaired waters through Total Maximum Daily Loads (TMDLs), and subsection (e) requires states to develop plans for addressing those sources. 33 U.S.C. §§ 1313(d), (e); 40 C.F.R. §§ 130.2, 130.5(b)(3), 130.6(c)(1), (6). In order to develop effective plans, states must have authority to address all significant sources of pollution including the water quality impacts of hydropower dams. Recognition of states' Section 401 authority in this kind of case is thus critical to achieving water quality standards.

Conversely, limiting state authority to address dams under Section 401 would remove an important tool from the Act and prevent states from protecting the broad array of uses designated in state water quality standards for the rivers and streams that are impaired as a result of hydropower dam operations. Without authority to address the impact of these dams, states cannot achieve water quality standards though their Section 303(e) water quality plans. States are preempted from regulating FERC licensed hydropower dams independent of federal law.[28] Absent the authority to place conditions on dams through Section 401, states will thus be constrained in their efforts to protect the numeric criteria and

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[28] *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 181 (1946) ("The detailed provisions of the [Federal Power] Act providing for the federal plan of regulation leave no room or need for conflicting state controls."); *California v. FERC*, 495 U.S. 490, 506-507 (1990).

designated uses in state water quality standards promulgated pursuant to Section 303.

B. States Can Make Real Improvements In Water Quality By Addressing The Pollution From Dams In Section 401 Water Quality Certifications

As noted in the first section of this brief, the issue presented to this Court is not a theoretical exercise in statutory construction. States can make real improvements to water quality through the regulation of dams. EPA concluded, in its 1989 report to Congress regarding the water quality impacts of dams, that these impacts can be mitigated through a mix of physical and operational measures and structural changes to dams. EPA suggests a range of measures that can be taken from selective withdrawal of reservoir water, to changes in the flow regime, to altering the structure of the dam to change the depth or manner of withdrawal. *Report to Congress: Dam Water Quality Study* at v-vi.

Further support for the idea that states can make a difference through the regulation of dams can be found in the USGS "Primer" on dams in which USGS concludes that the negative ecological impacts of dams can be better managed through the use of scientific knowledge. *USGS Primer* at 1-9. Similarly, based upon a detailed review of modifications to hydropower dams made by the Tennessee Valley Authority, researchers have concluded that "changes to dam operations can improve the ecological integrity of rivers." Bednarek, A.T. and D.D. Hart, *Modifying Dam Operations To Restore Rivers: Ecological Responses to Tennessee River Dam Mitigation*, 15(3) Ecological Applications at 997-1008 (2005); *see also* Hayes, D.F. et. al. *Enhancing Water Quality In Hydropower System Operations*, 34(3) Water Resources Research at 471-483 (March 1998)(concluding that operational changes in dam projects can increase dissolved oxygen levels without substantially impacting project purposes).

These kinds of water quality improvements resulting from modifications to dam operations offer significant potential for restoring entire watersheds. In a report recommending a watershed approach to improving water quality, the National Research Council recommends that the water quality impacts of dams be considered in watershed planning. *New Strategies for America's Watersheds* at 21-28.[29] The NRC report describes, as an illustration of a successful watershed approach, how the regulation of dams is contributing significantly to the protection of water quality in the Flathead River Basin. *Id.* at p. 22.

EPA and state water pollution control agencies are increasingly seeking to evaluate the potential for improving water quality through innovative regulation of dams. A review of state data submitted to EPA illustrates that there are many river and stream segments listed in states' Section 303(d), 33 U.S.C. § 1313(d), reports to EPA which are water quality impaired as a result of dams.[30] For instance, drawing from this data, researchers compiled a list of fifty-five hydropower projects in the Mississippi River basin associated with water quality impaired waters. John Crossman and Associates, *Evaluation of Hydropower Projects and Identification of Potential Opportunities for Pollutant Trading*, (2001) *available at* http://www.epa.gov/msbasin/pdf/hydropower_final.pdf. In this report, prepared on behalf of EPA, the researchers concluded that:

> [T]hese projects have the potential to make a significant contribution to national water quality objectives if technological advances to improve water quality in reservoirs,

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[29] See also *Regulatory Approaches*, at 15-18.

[30] Summaries of this data, not specific to dams but noting impacts from sources such as hydrologic modifications and flow impairments generally associated with dams, can be found on EPA's *TMDL Website, available at http://www.epa.gov/owow/tmdl/* and EPA's *2002 National Assessment Database, available at* http://www.epa.gov/waters/305b/index.html.

downstream tailwaters, and hydro-turbine releases are employed in a watershed based trading program.

Id. at p. 1.

Based on this kind of reasoning, states are requiring dam operators to employ technological advances and improved understandings of ways in which dam operations can be modified to reduce or minimize impacts on water quality. One typical example of state efforts in this regard can be found in the water quality certification issued by the State of California Water Resources Control Board pursuant to CWA Section 401 for the relicensing of the Lower Tule River Hydroelectric Project. California State Water Resources Control Board, *In the Matter of Water Quality Certification for the Southern California Edison Company Lower Tule River Hydroelectric Project*, FERC Project No. 372 (March 5, 2004), *available at http://www.waterrights.ca.gov/FERC/LowerTule401%20.pdf.* Southern California Edison Company operates this project which is a run-of-the-river dam that has historically impacted downstream water quality and aquatic habitat. Among the conditions in the water quality certification are minimum instream flow requirements and the development of a "Native Aquatic Species Management Plan." The purpose of this plan is to require the dam operator to monitor the impacts of flows through the dam and to ensure that the minimum stream flows protect several species of special concern impacted by the dam including certain species of fish and amphibians. The certification also requires Southern California Edison to monitor and develop actions such as further managing flows in order to minimize temperatures affecting those species.

Another example of the kinds of conditions that states can use in order to achieve water quality improvements can be found in the certification issued by the State of Oregon Department of Environmental Quality for the Pelton Round Butte Hydroelectric Project. FERC, *Portland General*

Electric Company and Confederated Tribes of the Warm Springs Reservation of Oregon, Order Approving Settlement and Issuing New License, Project No. 2030-036, at 23, 109-126, (June 21, 2005) *available at http://www.ferc.gov/whats-new/comm-meet/061505/H-5.pdf.* The project, operated by Portland General Electric Company and the Confederated Tribes of the Warm Spring Reservation of Oregon, includes three dams operated collectively in a modified run-of-the-river mode. Oregon determined that the project blocks fish passage to historic habitat, affects stream flows and thus fish habitat, temperature, and dissolved oxygen in the lower Deschutes River. The Section 401 certification therefore includes a range of conditions to address these problems ranging from fish passage requirements to specific conditions relating to achieving water quality standards for parameters such as temperature, dissolved oxygen, dissolved gas and turbidity. Oregon Department of Environmental Quality, *Evaluation and Findings Report On The Application For Certification Pursuant To Section 401 of the Federal Clean Water Act For the Relicensing of Pelton Round Butte Hydroelectric Project (FERC No. 2030)* (June 19, 2002) *available at http://www.deq.state.or.us/wq/401Cert/401CertHome.htm.*

A brief discussion of the requirements in the Pelton Round Butte certification related to achieving the standards for temperature and dissolved oxygen illustrates the kind of changes that can be made to a dam project without interfering with the project purpose. The Pelton Round Butte certification requires the dam operators to comply with temperature and dissolved oxygen monitoring and management plans. Demonstrating the importance of looking at dam impacts in the context of the entire watershed, Oregon reserves its authority to reevaluate these management plans at the conclusion of TMDLs being developed for both parameters. Further, in order to ensure that the dam can meet the water quality standards, the Pelton Round Butte certification also includes a requirement that the dam operators use a "selective

water withdrawal" facility to draw water from various points within the water column impounded behind the dam. This facility will consist of a tower built into the dam with two gates, one at the surface and one at depth. Through managing the discharge of water through these gates, the dam operators will better be able to meet water quality criteria for temperature and dissolved oxygen criteria. *Id.*

By taking advantage of this kind of approach and using the authority of Section 401, states can lead dam operators to make meaningful improvements in water quality. Continued authority under Section 401 to require and issue water quality certifications is a critical precursor to doing so. Congress clearly intended that states have this authority, and promised, in the Clean Water Act, that government would use its authority to prevent, reduce and eliminate pollution. States and authorized tribes require CWA Section 401 authority over discharges from hydropower dams in order to fulfill this promise.

CONCLUSION

The Court should affirm the decision of the Maine Supreme Judicial Court.

Respectfully Submitted,

JAMES MURPHY
WETLANDS AND WATER RESOURCES COUNSEL
NATIONAL WILDLIFE FEDERATION
58 State Street
Montpelier, Vermont 05602
(802) 229-0650

Counsel for Amicus Curiae National Wildlife Federation

DAVID K. MEARS
ENVIRONMENTAL AND NATURAL RESOURCES LAW CLINIC
VERMONT LAW SCHOOL
PO Box 300
South Royalton, Vermont 05068
(802) 831-1627

Counsel of Record for Amici Curiae National Wildlife Federation, et al.

Supreme Court, U.S.
FILED
NOV 25 2005
OFFICE OF THE CLERK

No. 04 - 1527

In the
Supreme Court of the United States
October Term, 2004

S. D. WARREN COMPANY,
Petitioner,
v.
MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

On Writ of *Certiorari* to
the Supreme Judicial Court of Maine

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER ON THE MERITS

Counsel for Amicus Curiæ

MARTIN J. NEWHOUSE
Counsel of Record
Andrew R. Grainger
Michael E. Malamut
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111-2504
Tel.: (617) 695-3660 x 202
Fax: (617) 695-3656
martinnewhouse@nelfonline.org

QUESTION PRESENTED

Does the mere flow of the Presumpscot River through Warren's existing dams constitute a "discharge into" the Presumpscot River under section 401 of the Clean Water Act?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIÆ* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. The SJC's holding that while flowing through Warren's dams the River's waters cease to be waters of the United States is wrong as a matter of law 4

II. The SJC's test flatly contradicts this Court's teaching in *Miccosukee* 9

III. The SJC's decision must be reversed because a mere change in legal status cannot satisfy the purposes underlying Section 401(a) 11

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York 273 F.3d 481 (2d Cir. 2001)..... 9

Commissioner v. Banks, 125 S.Ct. 826 (2005)..... 3

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000)..... 3

Dubois v. U.S. Dept. of Agriculture, 102 F.3d 1273 (1st Cir. 1996)..... 9

EEOC v. Waffle House, Inc., 534 U.S. 279 (2002)..... 3

Exxon Mobile Corp. v. Saudi Basic Indus. Corp., 125 S.Ct. 1517 (2005)..... 3

Greenfield Mills, Inc. v. Macklin, 361 F.3d 934 (7th Cir. 2004)..... 12

Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003)..... 3

Kaiser Aetna v. U.S., 444 U.S. 164 (1979).....7, 8

Kelo v. City of New London, Conn., 125 S. Ct. 2655.....3

North Carolina v. FERC, 112 F.3d 1175 (D.C. Cir. 1997).....6, 13

Palazzolo v. Rhode Island, 533 U.S. 606 (2001)..... 3

S.D. Warren Co. v. Board of Envtl. Protection, 868 A.2d 210 (Me. 2005).....6, 7, 9, 12, 13

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 511 U.S. 154 (2001).....9

South Florida Water Mgmt. Dist. v. Miccosukee Tribe,, 541 U.S. 95 (2004)..... 3,4, 9, 10

Swanton v. Wheeler, 179 U.S. 141 (1900)..... 8

United States v. Appalachian Power Co., 311 U.S. 377 (1940)... 7

United States v. Chandler-Dunbar Co., 299 U.S. 53 (1913)..... 8

STATUTES, RULES, AND REGULATIONS

16 U.S.C. §§ 791(a) *et seq.* (Federal Power Act)..... 5

16 U.S.C. § 797(e)..... 5

33 U.S.C. §§ 1251, *et seq*..... 2

33 U.S.C. § 1341(a) (Clean Water Act § 401(a))..... *passim*

33 U.S.C. §§ 1362(12) (Clean Water Act § 502(12))..... 6

Sup. Court R. 37.6 1

MISCELLANEOUS

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d. ed. 1992)..... 11

No. 04 - 1527

In the
Supreme Court of the United States
October Term, 2004

S.D. WARREN COMPANY,
Petitioner,
v.
MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

On Writ of *Certiorari* to
the Supreme Judicial Court of Maine

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER ON THE MERITS

INTEREST OF *AMICUS CURIÆ*

Amicus Curiæ New England Legal Foundation ("NELF") seeks to bring to the Court's attention its views and the views of its supporters on the question whether the mere flow of water through a privately-owned hydroelectric dam results in a discharge within the meaning of Section 401(a) of the Clean Water Act, 33 U.S.C. § 1341(a). In the decision below, the Supreme Judicial Court of Maine ("SJC") answered this question in the affirmative with respect to the dams owned and operated by Petitioner S.D. Warren Company ("Warren") on the Presumpscot River ("River") in Maine. As *Amicus* demonstrates herein, the SJC's decision was incorrect and should be reversed.[1]

1 Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that neither counsel for Petitioner nor Respondent authored this brief in whole or

Amicus Curiæ NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States.

NELF's members are affected by the business climate in New England, which depends, in part, upon an application of the federal laws enacted to protect the environment, such as the Clean Water Act ("CWA"), 33 U.S.C. §§1251, *et seq.*, in a way that fairly reflects Congress's intentions as embodied in such statutes. Especially in a time of diminishing oil and gas reserves, it is important that costly and possibly duplicative regulatory requirements be imposed on renewable sources of energy, such as hydroelectric dams, only if they are well grounded in the provisions of the CWA. NELF's members and supporters believe that a balanced and reasonable approach to regulation, which respects the economic efficiencies of free market forces, is essential for the maintenance of a robust business climate, which in turn is essential to the long-term success of the region's businesses.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business

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in part and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief.

communities.[2] *Amicus* believes that serious negative consequences for all businesses and other activities that involve use of the national waterways may well result from the SJC's novel and manifestly erroneous expansion of the meaning of "discharge" as used in Section 401(a) of the CWA. *Amicus* believes that this brief provides an additional perspective which may aid the Court in determining the issue presented. Pursuant to Supreme Court Rule 37.2 (a), counsel for Amicus has submitted consents by all parties to the filing of this Brief.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the Brief of Petitioner S.D. Warren Company ("Warren").

SUMMARY OF ARGUMENT

The SJC determined that a discharge occurs within the meaning of Section 401(a) of the Clean Water Act, 33 U.S.C. § 1341(a), merely from the operation of Warren's dams on the River. In reaching this conclusion, the SJC engaged in a startling departure from prior federal jurisprudence under the CWA, including the recent decision by this Court in *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004) (*"Miccosukee"*). Eschewing these precedents, the Maine court applied a novel test to determine the existence of a discharge, holding that a purported change in the legal status of the River's waters from public to private as they pass through Warren's dams, followed instantaneously by their

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2 *See, e.g., Kelo v. City of New London, Conn.*, 125 S. Ct. 2655 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005); *Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

alleged transformation back into waters of the United States as they emerge, constitutes an "addition" sufficient for a finding that a discharge occurs under Section 401(a). The Maine Court's new test is manifestly incorrect for at least three reasons. First, the SJC's premise that while in Warren's dams the River's waters are no longer waters of the United States is erroneous as a matter of law. Second, the SJC's test directly contradicts this Court's decision in *Miccosukee* which confirms that where, as in this case, water is merely transferred from one portion of a body of water to another portion of the same body of water, no addition—and, therefore, no discharge—can occur within the meaning of Section 401(a). Finally, the SJC's decision is erroneous because the purported change in the waters' status upon which the Maine court relied, even if true, could never satisfy the purposes underlying Section 401(a) and the Maine court's decision ignores the careful regulatory balance Congress struck when it enacted that statutory provision.

ARGUMENT

I. The SJC's holding that while flowing through Warren's dams the River's waters cease to be waters of the United States is wrong as a matter of law.

The primary issue before the SJC in this case, and the single issue before this Court, is whether the operation of Warren's five hydroelectric dam projects on the River results in a "discharge" to the waters of the River within the meaning of Section 401(a) of the CWA. The issue arises because of the interplay between the federal regulatory scheme governing hydroelectric dams and the CWA.

The Federal Power Act ("FPA"), 16 U.S.C. §§ 791a, *et seq.*,

vests in the Federal Energy Regulatory Commission ("FERC") the responsibility for licensing the construction, operation and maintenance of hydroelectric dams, such as the dams owned and operated by Warren that are at issue in this case. 16 U.S.C. § 797(e). Section 401(a) of the CWA, 33 U.S.C. § 1341(a), provides that, where an applicant is seeking a federal license for any activity that "may result in any *discharge* into the navigable waters" (emphasis added) the applicant must provide the licensing agency with a certification from the state in which that discharge may occur that the discharge will be in compliance with the water quality standards of both the CWA and ~~the a~~ffected state. 33 U.S.C. § 1341(a). Accordingly, where the owner and operator of a hydroelectric dam applies to FERC for a renewal of its federal license pursuant to the FPA, it must obtain state water quality certification *if* the operation of its dam results in a "discharge" within the meaning of Section 401(a) of the CWA.

In this case, Warren applied to FERC for the re-licensing of the five hydroelectric dam projects that it owns and operates on the River. Because of the interplay of the FPA and Section 401(a) of the CWA, Warren was required to apply for water quality certification from the Maine Department of Environmental Protection ("DEP"). This Warren did under protest. Warren's position was, and remains, that the operation of its dams does not result in a discharge into the waters of the River. Therefore it asserts that no DEP certification is required under Section 401(a).

Warren's argument that the activities of its dams do not cause a discharge under Section 401(a) is based on the legal requirements of the CWA and the undisputed facts

surrounding the dams' operations. Under the CWA, for there to be a discharge within the meaning of Section 401(a) there must be an "addition" of something to the water body at issue. *See* Section 502(12) of the CWA, 33 U.S.C. §1362(12);[3] *North Carolina v. FERC*, 112 F. 3d 1175, 1188 (D.C. Cir. 1997) (because the volume of water passing through the dam's turbines decreased, there was no addition and, therefore, no discharge). It is undisputed that Warren's hydroelectric dam projects are operated in "run-of-river" mode, *i.e.*, outflow from each dam is approximately equal to inflow on an instantaneous basis during normal operating conditions, App. At A-120, and the operation of the dams neither removes nor adds any substance, not even water, from or to the river's waters, App. At A-87 to A-88, A-106 to A-110, A-120 to A-121.

Even as it agreed with the premises of Warren's argument, the SJC denied Warren's appeal. The SJC acknowledged that the operation of Warren's dams neither subtracts from nor adds to the total amount of water in the river. *S.D. Warren Co. v. Board of Environmental Protection*, 868 A. 2d 210, 216 (2005) (*"Warren"*). Likewise, it recognized that "[a]n 'addition' is the fundamental characteristic of any discharge." *Id.*, 868 A. 2d at 215 (citing *North Carolina v. FERC*, 112 F. 3d 1175, 1187 (D.C. Cir. 1997). Nonetheless, the SJC improperly altered the test to be applied and concluded that the operation of the dams results in a discharge under Section 401(a) of the CWA.

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3 33 U.S.C. § 1362(12) states: "The term 'discharge of a pollutant' and the term 'discharge of pollutants' each mean (A) any *addition* of any pollutant to navigable waters from any point source, (B) any *addition* of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." (Emphasis added.)

Simply put, because the court below could not find an actual "discharge" resulting from the operation of the dams, it invented a new "control" test for determining the existence of a discharge. In a truly novel chain of reasoning, the Maine court wrongly determined that, as the river's waters flow through Warren's dams, they are no longer waters of the United States because for a few moments they are under private control. The Court then concluded "[b]ecause these waters have lost their status as *waters of the United States,* when they are redeposited into the natural course of the river it results in an addition to the *waters of the United States.*" *Warren,* 868 A. 2d at 216 (emphasis in the original).

Whether, even if the SJC were correct, such an intangible change in the waters' status could ever amount to a discharge under Section 401(a) will be addressed in Part III, *infra.* In fact, the SJC was flatly wrong: while flowing through Warren's dams, the River's waters never cease to be waters of the United States.

As this Court has stated on numerous occasions, Congress's control over the nation's waters stems entirely from, and is only delimited by, the paramount powers granted to Congress under the Commerce Clause. *See, e.g., Kaiser Aetna v. United States,* 444 U.S. 164, 174 (1979). This power is so extensive that it is not limited to matters of navigation, but embraces all aspects in which the Nation's waters may play a role in foreign or interstate commerce. *United States v. Appalachian Power Co.,* 311 U.S. 377, 426-7 (1940) ("[I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . ."). Because of the "important public interest" in the flow of waters

that "in their natural condition are in fact capable of supporting public navigation," *Kaiser Aetna*, 444 U.S. at 175, such waters cannot be privately owned. *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913) ("[T]hat the running water in a great navigable stream is capable of private ownership is inconceivable."), *quoted in Kaiser Aetna v. United States*, 444 U.S. at 175.[3]

It is undisputed that the waters of the River constitute navigable waters and, therefore, are waters of the United States.[4] If those waters ceased to be waters of the United States while in Warren's dams, it would follow that Congress would have no authority over those waters for the few moments that they are flowing through the dams. The precedents cited above, however, conclusively establish the contrary to be the case: Congressional authority over the River's waters under the Commerce Clause cannot be diminished by any private activity and is utterly unaffected by the fact that the waters may momentarily pass through a privately controlled dam. *See, e.g., Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 511 U.S. 159, 171-72 (2001) (whether water qualifies as "navigable waters" under CWA is unaffected by fact that water may not actually be navigable at any given

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3 Congress's preeminent authority in this area, and its override of private property rights, is embodied in the doctrine of the navigational servitude which, as this Court has stated, "is an expression of the notion that the determination whether a taking has occurred must take into consideration the important public interest in the flow of interstate waters that in their natural condition are in fact capable of supporting public navigation." *Kaiser Aetna*, 444 U.S. at 175. *See, e.g., Scranton v. Wheeler*, 179 U.S. 141, 163 (1900) (erection of piers to improve navigation for the public purpose on property privately owned by a riparian owner "infringes no right of the riparian owner.")

4 This case would not exist if this were not true, since Section 401(a) of the CWA only applies when there is a "discharge into the navigable waters." 33 U.S.C. § 1341.

point). Accordingly, as Congress only has authority over United States waters and, without question, it has authority over all of the River's waters, even those momentarily in Warren's dams, the basic premise of the SJC's holding is invalid. The status of the River's waters does not change as they flow through the dams. Their exit from the dams, therefore, cannot create an "addition" to the waters of the United States, since they have never been anything else.[5]

II. The SJC's Test Flatly Contradicts this Court's Teaching in *Miccosukee*

The SJC's change in legal control test is also legally flawed because it rests on the Maine court's erroneous view that when water is removed from a body of water, the simple redeposit of that same water back into the water body from which it came can qualify as an "addition" and, therefore, a discharge under the CWA. *Warren*, 868 A. 2d at 215. That the SJC is mistaken in this regard was made clear by this Court in *Miccosukee*.

Quoting with approval the Second Circuit's observation in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2d Cir. 2001) that, "[i]f one takes a ladle of

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5 To the extent that the single case relied upon by the SJC, *Dubois v. Dep't of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), appears to hold otherwise, that holding would be wrong under the decisions of this Court cited above. In fact, however, *Dubois* does not contradict Supreme Court precedent or *Amicus's* argument. In *Dubois*, the court opined that water removed from a river and pumped through pipes to be deposited in a pond lost thereby its status as waters of the United States. 102 F.3d at 1297. Whether or not the *Dubois* court's analysis was correct (it cited to no authority supporting its view), the situation before it was so different from the facts of this case as to have no application whatsoever. Here, at most, the waters at issue are momentarily diverted from their natural flow in the River. As shown above, there is no basis to conclude that, for those moments, they lose their chief characteristic as navigable waters of the United States.

soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot," 273 F. 3d at 492, this Court in *Miccosukee* affirmed that where water is simply being moved from one part of a water body to another part of the same water body, there cannot be an "addition" under the CWA. 541 U.S. at 109.

Here, the flow of the River's waters through Warren's dams does not alter the fact that the River remains, and is linguistically and factually recognized to be, a single body of water. Moreover, as noted above, it is undisputed that nothing extraneous is added to the River's waters as they pass through the dams. Plainly, then, under *Miccosukee* what occurs as a result of the operation of Warren's dams, *i.e.*, the physical removal from and the replacement of the same water into the same body of water, cannot qualify as an "addition" under the CWA.[6] From this the conclusion is inescapable that the SJC erred when it concluded that a purported theoretical "removal" and "redeposit" based purely on an alleged brief change in legal status could ever constitute a "discharge" under the CWA.

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6 *Miccosukee* makes it clear that, to the extent that the Presumpscot River's waters arguably are diverted from their natural path as they pass through Warren's dam projects, no addition under the CWA has occurred. As the Court observed, "[t]he [respondent] does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of any pollutants." 541 U.S. at 108. Likewise, a diversion of the Presumpscot River's waters through Warren's dams cannot constitute an addition under *Miccosukee*'s teaching.

III. The SJC's decision must be reversed because a mere change in legal status cannot satisfy the purposes underlying Section 401(a)

In finding that the operation of Warren's dams results in an "addition" and, therefore, a "discharge" under Section 401(a), the Maine court expanded the meaning of those terms under Section 401(a) beyond anything that Congress intended. It ignored the careful balance that Congress struck in Section 401 of the CWA between federal and state regulatory authority over the nation's waters. Under the plain meaning of Section 401(a), only where the operation of a federally licensed activity results in an actual addition to the nation's waters is the additional layer of state regulation mandated. In a case such as this, where no such actual addition has occurred, Congress has concluded that only federal regulation is required. Because, by focusing on a mere change in status as opposed to whether an actual addition has occurred, the Maine court violated this careful regulatory balance, its decision that the operation of Warren's dams results in a discharge to the River should be reversed.

Simply put, even if the SJC were correct that while in Warren's dams the River's waters lost their status as waters of the United States, its decision would still have to be reversed because a mere intangible change in the water's status could never amount to a discharge under Section 401(a). As noted above, *see pp. 5-6, supra,* although the SJC conceded that, for there to be a discharge within the meaning of the Section 401(a) there must be an "addition," it ultimately ignored what that word means. In contrast, other courts that have been called upon to determine whether a discharge has occurred and,

therefore, asked to determine the meaning of an "addition" in the context of the CWA have applied a common sense, normal English language meaning to that term. The word "addition" is commonly defined to mean "something added." *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992) at 20. In the context of the CWA, to add "something" has been found consistently to mean the actual addition of something from outside to the water body at issue, *see, e.g., Greenfield Mills Inc. v. Macklin*, 361 F.3d 934, 949 (7th Cir. 2004) (addition consists of "discharge of dredged material, such as that removed from the supply pond, into a contiguous body of water or wetland"), and not to a mere change in name, title or control. Indeed, without more, these latter changes—such as the change that the SJC purported to identify in this case, *i.e.*, the river water's alleged temporary loss of status as United States waters—can have no impact whatsoever on the actual water itself. Logically, therefore, the test for an "addition" under section 401(a)—and the basis upon which potentially duplicative state regulation is required--cannot hinge on such factors.

The disconnect between the SJC's decision and Congress's intent as set forth in Section 401 is demonstrated by the fact that the Maine court's approach proves too much and, if followed, would lead to absurd results. Thus, under the SJC's test all non-federally operated dam projects, without exception, would result in a discharge within the meaning of Section 401(a), because all such projects would inevitably result in "private control" of the waters of the United States, whether or not an actual addition to the water has occurred. As the SJC itself recognized, "Warren is not adding more water to the river." *Warren*, 868 A.2d at 216. To find that a discharge has

occurred in these circumstances makes the discharge requirement of Section 401(a) totally meaningless. Further, the SJC's test arguably would require a finding that an "addition" has occurred even where a dam's operation actually reduces the volume of water in a river, because even a smaller volume of water reentering the river after passing through the dam would still be "an addition *to the waters of the United States.*" *Warren,* 868 A.2d at 216 (emphasis in the original). Such a result would contradict the holding in *North Carolina v. FERC, supra,* 112 F.3d at 1188, which the SJC cited in another connection with favor (*Warren,* 868 A.2d at 215), that there cannot be an addition and, therefore, there cannot be a discharge under the CWA where there is a decrease in the volume of water passing through a dam's turbines.

As these absurd outcomes demonstrate, the SJC's decision violates the purpose for which Congress enacted Section 401 of the CWA and should be reversed.

CONCLUSION

For the reasons stated above, this Court should reverse the decision of the Supreme Judicial Court of Maine and hold that there is no discharge within the meaning of Section 401(a) of the Clean Water Act, 33 U.S.C. § 1341(a), as a result of the operation of Warren's dams.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,

Martin J. Newhouse
Counsel of Record
for Amicus Curiæ
Andrew R. Grainger
Michael E. Malamut
New England
Legal Foundation
150 Lincoln Street
Boston, MA 02111-2504
Telephone: (617) 695-3660 x 202
Facsimile: (617) 695-3656
martinnewhouse
@nelfonline.org

Dated: November 23, 2005

No. 04-1527

IN THE

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S.D. WARREN COMPANY,

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v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

ON WRIT OF CERTIORARI TO THE
MAINE SUPREME JUDICIAL COURT

BRIEF OF THE STATES OF NEW YORK, WASHINGTON, ALASKA, ARIZONA, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WEST VIRGINIA, WISCONSIN, THE COMMONWEALTH OF PUERTO RICO, THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND THE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

ROB McKENNA
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504
(360) 753-6245

ELIOT SPITZER
Attorney General of the State of New York
CAITLIN J. HALLIGAN*
Solicitor General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8020

* *Counsel of Record*

Attorneys for Amici Curiae

(Additional Attorneys Listed on Signature Page)

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. HYDROELECTRIC DAM OPERATIONS CONSTITUTE A "DISCHARGE" SUBJECT TO STATE CERTIFICATION PURSUANT TO SECTION 401 OF THE CLEAN WATER ACT.	5
A. The Plain Text of Section 401 Covers "Discharges" From Hydroelectric Dams	6
B. Petitioner's Interpretation of Section 401 Would Frustrate the Purposes of the Clean Water Act	9
1. Section 401 Is Intended to Give the States Broad Authority to Remedy "Pollution" of Their Water Bodies, Including Pollution Caused by Hydroelectric Dams.	10
2. Section 401 Authorizes the States to Protect and Enforce Their Water Quality Standards Against the Threats Posed by Hydroelectric Dams.	13

Contents

Page

C. Section 401's Legislative History Demonstrates that Congress Specifically Intended It to Apply to Hydroelectric Dams Licensed by FERC. 16

II. THIS COURT'S ANALYSIS OF SECTION 401 IN *PUD No. 1*, NOT ITS DISCUSSION OF SECTION 402 IN *MICCOSUKEE*, IS RELEVANT TO WHETHER THE OPERATION OF A HYDROELECTRIC DAM MAY RESULT IN A DISCHARGE FOR PURPOSES OF SECTION 401. 21

A. *PUD No. 1* Confirms that Hydroelectric Dams Cause a Section 401 "Discharge." 21

B. *Miccosukee*'s Analysis of Section 402's Narrower Standard, "Discharge of Pollutants," Is Not Relevant Here. 23

CONCLUSION 25

TABLE OF CITED AUTHORITIES

Page

CASES:

Alabama Rivers Alliance v. FERC,
325 F.3d 290 (D.C. Cir. 2003) 15

American Rivers, Inc., v. FERC,
129 F.3d 99 (2d Cir. 1997) 12, 20

Barnhart v. Sigmon Coal Co.,
534 U.S. 438 (2002) 8

California v. FERC,
495 U.S. 490 (1990) 12, 22

California v. United States,
438 U.S. 645 (1978) 13

Escondido Mutual Water Co. v. La Jolla Band of Mission Indians,
466 U.S. 765 (1984) 6

FPL Energy Maine Hydro LLC,
111 F.E.R.C. P61,104 (2005) 20

Helvering v. Morgan's, Inc.,
293 U.S. 121 (1934) 7

National Wildlife Federation v. Consumers Power Company, 862 F.2d 580 (6th Cir. 1988) 11

Cited Authorities

Page

National Wildlife Federation v. Gorsuch, 530 F. Supp. 1291 (D.D.C. 1982), *rev'd*, 693 F.2d 156 (D.C. Cir. 1982) 10

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 7, 10

New York v. United States, 505 U.S. 144 (1992) 13

Oregon Natural Desert Ass'n v. Dombeck, 172 F.3d 1092 (9th Cir. 1998) 7

PUD No.1 v. Washington Department of Ecology, 511 U.S. 700 (1994) ..... *passim*

Sayles Hydro Ass'n v. Maughan, 985 F.2d 451 (9th Cir. 1993) 12

S.D. Warren Co. v. Board of Environmental Protection, 2005 ME 27, 868 A.2d 210 1

South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) 5, 21, 23, 21

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 9

Watt v. Alaska, 451 U.S. 259 (1981) 6

Cited Authorities

Page

STATUTES:

Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 ..... *passim*

Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1311(a), 1342(a), (b)) 17

16 U.S.C. § 791a *et seq.* 3, 12

33 U.S.C. § 1251 ..... *passim*

33 U.S.C. § 1311 15

33 U.S.C. § 1313 ..... 4, 13, 15, 16

33 U.S.C. § 1313(c)(2)(A) 14

33 U.S.C. § 1314(f)(2)(F) 4, 10, 12, 13

33 U.S.C. § 1315 15

33 U.S.C. § 1341 ..... *passim*

33 U.S.C. § 1342 ..... 3, 7, 15, 24

33 U.S.C. § 1362 ..... *passim*

33 U.S.C. § 1370 ..... 2, 13

Cited Authorities

Page

FEDERAL REGULATIONS:

40 C.F.R. § 122.44 15

40 C.F.R. § 130.7 15

40 C.F.R. § 131.3(b) 14

40 C.F.R. § 131.10 ..... 4, 14, 15

40 C.F.R. § 131.11 ..... 4, 14

STATE REGULATIONS:

N.Y. Comp. Codes R. & Regs. tit. 6, § 701.2 14

N.Y. Comp. Codes R. & Regs. tit. 6, § 701.5 14

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MISCELLANEOUS:

California Energy Commission, Environmental Performance Report of California's Electric Generation Facilities: A Report to the State Legislature, Publication # 700-01-001 (July 2001), *available at* http://www.energy.ca.gov/reports/2001-06-28_700-01-001.pdf. 11

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INTEREST OF AMICI CURIAE

Amici curiae States, the Commonwealth of Puerto Rico, the Pennsylvania Department of Environmental Protection ("PADEP"), and the International Association of Fish and Wildlife Agencies ("IAFWA") respectfully urge affirmance of the Maine Supreme Judicial Court's decision in *S.D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27, 868 A.2d 210, holding that Section 401 of the Clean Water Act ("Act"), 33 U.S.C. § 1341, authorizes the State of Maine to issue a "certification" imposing conditions on the operation of Petitioner S.D. Warren's hydroelectric dam facilities as a prerequisite to the issuance of any federal license or permit to Petitioner by the Federal Energy Regulatory Commission ("FERC").[1]

There are over 1,500 federally licensed hydroelectric dam facilities throughout the nation. Since the early 1970s, States have used their Section 401 certification authority to limit pollution caused by these facilities. Without state oversight under Section 401, the operation of hydroelectric dams would degrade significantly the chemical, biological, and physical integrity of affected waters. For example, water released from hydroelectric dam impoundments often has reduced levels of dissolved oxygen, which can cause fish to suffocate. Such water also may be significantly warmer or colder than natural conditions, and cold-water fish such as salmon and trout

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1. Under Rule 37.4 of this Court, *amici* States are not required to obtain consent to the filing of this brief. The parties have consented to the filing of this brief by PADEP, a state agency, and the IAFWA, a not-for-profit corporation whose members include the fish and wildlife agencies of all fifty States, the Commonwealth of Puerto Rico, and seven Canadian provinces and territories, as well as federal and dominion agencies having jurisdiction and responsibility for fish and wildlife resources. This brief was not written in whole or part by counsel for a party, and no one other than *amici* made a monetary contribution to its preparation and submission.

cannot long survive in warm waters. A dam may permanently impede the travel of salmon, trout, and other species of fish that regularly move between inland waters and the ocean, leaving large stretches of river devoid of such fish. Hydroelectric facilities that "fill and spill" in order to optimize the generation of power during periods of peak demand cause the surface level of waters to fluctuate, which can erode exposed banks, and drain or flood adjacent wetlands. The mechanical grind of hydroelectric turbines often kills large numbers of fish that pass downstream. Sediment with contaminants can build up behind dams, harming bottom-dwelling organisms and causing the accumulation of contaminants in higher-level aquatic species that feed upon them. In short, the operation of a hydroelectric dam can significantly impair recreational and commercial fishing and boating, and destroy wetland and river areas absent carefully designed conditions imposed to protect water quality.[2]

Congress has left no doubt that the States are authorized to regulate water pollution generally. Indeed, the Act expressly recognizes the States' primary role in ameliorating such pollution. *See* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ."); *see also id.* § 1370 (providing that the States are not precluded from enforcing any pollution abatement requirement, so long as state standards meet or exceed federal standards). The state oversight authorized by Section 401 is especially critical to controlling the adverse

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2. *Amici* recognize that hydroelectric facilities provide renewable energy and other benefits, such as water supply and recreation. These benefits can coexist with protections against the potential adverse water quality effects of these facilities. Indeed, because of Section 401, States and hydropower licensees frequently work together to develop such mutually beneficial solutions.

impacts that result directly from the operation of hydroelectric dams because state regulation of such dams is otherwise largely preempted by the Federal Power Act, *see* 16 U.S.C. § 791a *et seq.*, and no other provision of the Clean Water Act allows the States adequately to address dams' effects. Exempting the operation of hydroelectric dams from the reach of Section 401 would seriously undermine the States' authority under the Act to protect their citizens, economies, and environment, and *amici* therefore have a strong interest in affirmance of the decision below.

SUMMARY OF ARGUMENT

I. Petitioner's contention that Section 401's state certification requirement does not apply to the operation of hydroelectric dam facilities is incompatible with the plain language of that provision. State certification is required for any federally licensed or permitted activity that "may result in *any discharge* into the navigable waters." 33 U.S.C. § 1341(a)(1) (emphasis added). The term "any discharge," by its plain meaning, sweeps more broadly than the narrower phrase "discharge of any pollutant" – language from Section 402 of the Act, *id.* § 1342, that Petitioner would import into Section 401 to limit the grounds for state certification. The Act's definitional provision confirms Section 401's more expansive reach. It states that a "discharge," as used in Section 401, "*includes* a discharge of a pollutant." *Id.* § 1362(16) (emphasis added). In other words, every "discharge of a pollutant" is a "discharge," but not every "discharge" is a "discharge of a pollutant."

The purpose and structure of the Act as a whole confirm this conclusion. Congress expressly recognized the need to address "pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters . . . ,

including changes caused by the construction of dams." *Id.* § 1314(f)(2)(F). Importantly, such "pollution," as defined by the Act at 33 U.S.C. § 1362(19), may occur even in the absence of any "pollutant," such as where a hydroelectric dam alters the water's movement or flow, or otherwise affects its physical, chemical, or biological integrity. State certification under Section 401 is the most effective means for the States to address the pollution caused by such facilities, and that tool must remain available to accomplish the Act's objective of maintaining the integrity of the Nation's waters. *See id.* § 1251(a). Equally significant, Petitioner's reading of the Act would severely impair the States' ability to preserve their water quality standards – standards that the Act itself requires each State to develop and achieve for each water body. *Id.* § 1313(c)(2)(A); 40 C.F.R. §§ 131.10, 131.11.

The relevant legislative history further affirms that Section 401 applies to hydroelectric dam facilities. Legislators instrumental to the enactment of Section 401 explicitly recognized that hydroelectric dams would be subject to state certification. Moreover, Section 401's certification requirement was adopted in 1970, two years before the enactment of Section 402's National Pollutant Discharge Elimination System ("NPDES") permit program, making clear that Section 402's limitations should not be read into Section 401.

II. Petitioner's construction of Section 401 is contrary to *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700 (1994). There, the Court expressly concluded that state certification was necessary to operate a hydroelectric dam facility because the facility would "discharge" water after using it to generate electricity. *Id.* at 709, 711. That conclusion, which was necessary to the Court's decision approving the Section 401 certification challenged in *PUD No. 1*, is sound and should be given *stare decisis* effect.

South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004), upon which Petitioner relies, is not to the contrary. That case did not construe Section 401's "any discharge" standard, but rather the distinct "discharge of any pollutant" standard of Section 402. Because the Act expressly defines "discharge of a pollutant" as an "addition" of a pollutant to navigable waters from a point source, *see* 33 U.S.C. § 1362(12), the *Miccosukee* Court looked to whether any pollutant had been *added*, via a point source, from a "meaningfully distinct" water body. 541 U.S. at 109-112. But a "discharge" within the meaning of Section 401 may occur regardless of whether there has been any addition to navigable waters, so *Miccosukee*'s reasoning is not applicable to Section 401.

ARGUMENT

I. HYDROELECTRIC DAM OPERATIONS CONSTITUTE A "DISCHARGE" SUBJECT TO STATE CERTIFICATION PURSUANT TO SECTION 401 OF THE CLEAN WATER ACT.

The Supreme Judicial Court of Maine held that Petitioner, as the operator of five federally-licensed hydroelectric dams, must obtain a water quality certification from the State of Maine pursuant to Section 401 of the Act. That holding is consistent with the plain text of Section 401, the purpose and structure of the Act, and the legislative history underlying Section 401 – all of which demonstrate that Congress intended that Section 401's certification requirement apply to the operation of hydroelectric dams. Accordingly, the decision of Maine's highest court should be affirmed.

A. The Plain Text of Section 401 Covers "Discharges" From Hydroelectric Dams.

Statutory construction begins with the plain text of the statute. *Watt v. Alaska*, 451 U.S. 259, 265 (1981). Section 401(a)(1) directs that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate." 33 U.S.C. § 1341(a)(1). Thus, "any discharge" associated with "any activity" that requires a federal license or permit triggers the State's authority to: (i) issue or deny the required certification; or (ii) place conditions or limitations on its certification to assure that the activity does not violate certain of the Act's requirements or "any other appropriate requirement of State law." *PUD No. 1*, 511 U.S. at 711-14; 33 U.S.C. § 1341(d).

"Congress expresses its purposes through the ordinary meaning of the words it uses," *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984), and the "ordinary" meaning of the word "discharge" in Section 401 plainly encompasses water flowing from the dam of a hydroelectric facility. *See* Webster's Ninth New Collegiate Dictionary 360 (1986) (defining the verb "discharge" to mean "to let go," "to release from confinement," "to give outlet or vent to," and to "emit," and defining the noun "discharge" as "the act of . . . release," "a flowing out," "a rate of flow," and "something that is emitted").

Moreover, the Act's definitional section makes clear that the word "discharge," as used in Section 401, is to be construed broadly. It states that "[t]he term 'discharge' when used without qualification *includes* a discharge of a pollutant" or pollutants. 33 U.S.C. § 1362(16) (emphasis added).

Congress' use of the word "includes" is significant. In contrast, each of the other 23 definitions set forth in 33 U.S.C. § 1362 — including the definition of "discharge of a pollutant" in 33 U.S.C. § 1362(12) — uses the more restrictive word "means." As this Court has observed, "where 'means' is employed, the term and its definition are to be interchangeable equivalents"; by contrast, "the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition." *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125-26 n.1 (1934); *see also Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998) ("'Discharge' is the broader term [as compared with 'discharge of a pollutant'] because it includes all releases from point sources, whether polluting or nonpolluting."); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982) ("As a general rule, . . . 'means' . . . excludes any meaning that is not stated," "rather than the looser phrase 'includes.'" (internal quotation marks omitted)).

Petitioner's effort (Pet. Br. 16-17, 21-22) to incorporate Section 402's "discharge of any pollutant" standard into Section 401 is counter to the Act's plain language.[3] By its express terms, Section 401 is triggered not only by the discharge of pollutants but, far more broadly, by "*any* discharge." 33 U.S.C. § 1341(a)(1) (emphasis added). Moreover, by requiring an applicant for a federal license or permit to obtain a certification for "any activity . . . which *may result* in any discharge into the navigable waters," Section 401, unlike Section 402, is triggered not only by an actual discharge, but by the mere possibility of any discharge (whether of a pollutant or otherwise). *Id.* § 1341(a)(1) (emphasis added). Had Congress intended to restrict Section 401's reach to the actual discharge of pollutants, it easily

3. Section 402 of the Act establishes a NPDES permit requirement for the "discharge of any pollutant" into navigable waters from any "point source" (*i.e.*, conveyance). *See* 33 U.S.C. § 1342.

could have done so. It chose instead to extend Section 401's coverage to activities that "may result in any discharge," and this Court should reject Petitioner's invitation to equate the disparate language in Sections 401 and 402.

Nor, contrary to Petitioner's chief assertion (Pet. Br. 14-20, 22-23), does the phrase "any discharge" mean the "addition" of some foreign substance to navigable waters. No addition is connoted by the ordinary meaning of "discharge," *see supra*, and the Act's definition of "discharge," as used in Section 401, makes no mention of an "addition." *See* 33 U.S.C. § 1362(16). By contrast, "*discharge of a pollutant*" — as used in Section 402 — is expressly defined as "any *addition of any pollutant* to navigable waters from any point source." *Id.* § 1362(12) (emphasis added). It is a well-established principle of statutory construction that "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (internal quotation marks omitted). Thus, the term "any discharge," as used in Section 401, should not be interpreted to mean the addition of a pollutant or other substance.

Because the hydroelectric dam facilities operated by Petitioner "may result in any discharge," Maine properly imposed various operational and structural conditions on the dams pursuant to Section 401 to address their adverse impacts. *See* Pet. App. A25-A29. Indeed, Petitioner's own characterization of the activities of its hydroelectric dam facilities leaves little doubt that their operations "result" in "discharges" subject to Section 401 certification. *See* 33 U.S.C. § 1341(a)(1). As Petitioner describes it, its dams result in the channeling of water into a "'power canal,' past the turbines, and then back into the riverbed through

the 'tailrace channel,'" in a manner that "affect[s] the movement and flow of the" river by "causing less dissolved oxygen to be retained in the water," "impacting habitat for aquatic organisms," and "chang[ing] the nature of the river's recreational uses" (Pet. Br. 3-4).[4] These activities qualify as a "discharge" that triggers the Act's certification requirement.

B. Petitioner's Interpretation of Section 401 Would Frustrate the Purposes of the Clean Water Act.

Petitioner would have this Court construe Section 401's certification requirement as reaching only activities that involve the addition of a pollutant or similar substance. Not only does that interpretation lack support from the text of Section 401, but it would thwart the Act's fundamental "objective" of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).[5]

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4. The hydroelectric dam facilities at issue here function differently than the diversion dam and associated canal and mills discussed by *amicus curiae* Augusta, Georgia. The Court's decision in this case should in no event exempt the Augusta project from Section 401 certification, particularly since it spans two states, impairs river navigation, degrades important spawning habitat, impedes the migration of fish, and has other adverse impacts on water quality.

5. Of course, where a State determines that the federally-licensed facility or its discharge poses no possibility of impairing water quality or causing "pollution," the State may simply issue the certification without conditions. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 n.9 (1985) (noting that where the pollution-prevention purpose of an environmental program is not genuinely implicated, the solution is "simply [to] issu[e] a permit"). Thus, Section 401 certification furthers the Act's goals without imposing undue burdens on applicants, the States, or involved federal agencies.

1. Section 401 Is Intended to Give the States Broad Authority to Remedy "Pollution" of Their Water Bodies, Including Pollution Caused by Hydroelectric Dams.

Congress expressly recognized the need to allow States to remedy all "pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters . . . , including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." *Id.* § 1314(f)(2)(F). The Act defines "pollution" broadly to encompass "the man-made or man-induced alteration of the chemical, physical, [and] biological . . . integrity of water." *Id.* § 1362(19).

Hydroelectric dam facilities may cause pollution, as defined by the Act, in several different ways. First, dams may severely alter the "chemical integrity" of local waters. In both waters upstream of dams (including reservoirs) and waters downstream, dams often lower dissolved oxygen levels, thus suffocating or driving off fish. Hydroelectric dam facilities may discharge or, by changing the flow regime, otherwise lead to high levels of dissolved minerals and nutrients such as iron, manganese, and phosphates. Dams also lead to water temperatures that are too high or too low for affected fish species, as well as to the build-up and release of sediment. *Gorsuch*, 693 F.2d at 161-64; Pet. App. A-51, A-56, A-58; *see also Nat'l Wildlife Fed'n v. Gorsuch*, 530 F. Supp. 1291, 1297-1303 (D.D.C. 1982), *rev'd*, 693 F.2d 156 (D.C. Cir. 1982).

Rather obviously, damming a river also changes its "physical integrity." Dams may create huge lakes, flooding upstream areas and limiting downstream flow (Pet. App. A-75 to A-77). Wetlands both upstream and downstream often are harmed by the rapid draining and flooding of the river

(Pet. App. A-116 to A-117). Indeed, dams can reduce or eliminate water in the "by-pass reach" – the stretch of river from which water is diverted for use in the electric generators – essentially destroying that portion of the water body (Pet. App. A-26 to A-27, A-49, A-78, A-89).

Hydroelectric dams further can harm the "biological integrity" of affected waters by changing conditions both downstream and upstream.[6] Such facilities may bar the upstream passage of fish, eels, and other aquatic organisms that move from ocean to inland water to spawn (Pet. App. A-27 to A-28, A-49, A-71, A-75 to A-77, A-89). Fish traveling downstream, too, often are killed or injured by the hydroelectric turbines. For example, one particularly large "pump-storage" hydroelectric generation facility was found to destroy a "substantial number" of fish and other organisms during normal operations, to the extent that "[m]illions of pounds of live fish, dead fish and fish remains [were] annually discharged into Lake Michigan." *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 582-83 (6th Cir. 1988). [7]

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6. In fact, a recent report by the California Energy Commission found that hydropower has a greater impact on California's natural resources than all other electricity generation sectors. *See* California Energy Commission, Environmental Performance Report of California's Electric Generation Facilities, Publication # 700-01-001 (July 2001), *available at* http://www.energy.ca.gov/reports/2001-06-28_700-01-001.pdf.

7. Petitioner attempts to minimize the serious harm caused by hydroelectric dams by variously likening this activity to taking a "ladle of soup from a pot, lift[ing] it above the pot, and pour[ing] it back into the pot," or characterizing it as "merely taking control over water in a man-made facility to cause it to travel from one point to another" (Pet. Br. 21). There is nothing "mere" about the adverse impacts on a river system typically caused by hydroelectric dam facilities (*e.g.*, lack of fish passage, low dissolved oxygen, gaseous supersaturation of water, reduced flow), and nothing akin to a "soup ladle" in the massive structures, flow changes, sediment depositions, and water impoundments associated with hydroelectric dams.

Any reading of Section 401 that deprives the States of their authority to regulate the activities of facilities known to seriously impair the chemical, physical, and biological integrity of the Nation's waters runs counter both to the Act's objective of addressing water pollution, and to the "primary" authority the Act confers upon the States to achieve this goal. 33 U.S.C. § 1251(a), (b). State authority over hydroelectric dams is generally otherwise preempted by the Federal Power Act, 16 U.S.C. § 791a *et seq.*,[8] and Section 401's certification process is the most effective means by which the States may regulate the activities of such facilities. *See, e.g., PUD No. 1*, 511 U.S. at 719-20 (discussing 33 U.S.C. § 1251(g) and 33 U.S.C. § 1314(f) as a basis for finding that States may impose a broad array of Section 401 controls on the entire activity associated with a hydro-power facility).

It is highly implausible that Congress would grant the States authority to address "pollution" resulting from a federally licensed activity, but at the same time dramatically limit the circumstances in which the States may exercise this authority.[9] Petitioner can identify no indication that Congress

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8. *See California v. FERC*, 495 U.S. 490, 498 (1990); *Sayles Hydro Ass'n v. Maughan*, 985 F.2d 451, 453 (9th Cir. 1993) (holding that the Federal Power Act "occupie[s] the entire field"); *American Rivers, Inc., v. FERC*, 129 F.3d 99, 111 (2nd Cir. 1997) (noting that the Clean Water Act has "diminished" the Federal Power Act's "preemptive reach by expressly requiring [FERC] to incorporate into its licenses state-imposed water-quality conditions").

9. There is no merit to Petitioner's suggestion that 33 U.S.C. § 1314(f)(2)(F) demonstrates that Congress did not intend to allow States to address dam-induced impairment to water quality through Section 401's certification process (Pet. Br. 23-25). This Court has held that Section 401 authorizes the States, through the certification process, to regulate all "pollution" resulting from dam operations. *See PUD No. 1*, 511 U.S. at 719-20. And although § 1314(f)(2)(F) addresses *nonpoint* sources of pollution resulting from the activities of "water flow diversion facilities," there is nothing in the statute to indicate that point source

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intended to place activities that may result in significant water pollution, such as the operation of hydroelectric dam facilities, outside the purview of state regulatory authority. To the contrary, except where it expressly provides otherwise, the Act does not "preclude or deny the right of any State . . . to adopt or enforce . . . any requirement respecting control or abatement of pollution," so long as the State's standards meet or exceed minimum federal standards. 33 U.S.C. § 1370; *see also generally California v. United States*, 438 U.S. 645, 653-63 (1978) (tracing the States' traditional powers over water resources). For these reasons, the term "discharge" in Section 401 should be read consistently with the broader objectives of the Act, to allow States to address the "pollution" caused by hydroelectric dams.

2. Section 401 Authorizes the States to Protect and Enforce Their Water Quality Standards Against the Threats Posed by Hydroelectric Dams.

The Clean Water Act directs each State to develop and achieve water quality standards for each of the water bodies within its borders, and Section 401's certification process provides the States with the mechanism for enforcing those standards.[10] Excluding the activities of hydroelectric dam

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discharges — such as those from a dam, *see* 33 U.S.C. § 1362(14) — are beyond the Act's reach. *See Miccosukee*, 541 U.S. at 106-07 (noting that § 1314(f)(2) "does not explicitly exempt nonpoint pollution sources from the NPDES program [of Section 402] if they *also* fall within the 'point source' definition").

10. The Act does not "commandeer" state regulatory authority. Rather, it provides that unless a State adopts water quality standards consistent with the Act's requirements, the federal government will determine the standards to be applied in the State. *See* 33 U.S.C. § 1313(b); *cf. New York v. United States*, 505 U.S. 144, 167 (1992) (recognizing "Congress' power to offer States the choice of regulating . . . according to federal standards or having state law pre-empted by federal regulation").

facilities from Section 401 certification would thus compromise the effectiveness of the comprehensive programs established by the States pursuant to the Act to achieve and maintain water quality standards.

The Act directs each State to issue "water quality standards" that generally consist of two major elements: (i) "the designated uses of the navigable waters involved"; and (ii) "the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10, 131.11. To establish the designated use (or "classification") of each body of water, States must take "into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also tak[e] into consideration their use and value for navigation." 33 U.S.C. § 1313(c)(2)(A); *see also* 40 C.F.R. § 131.10(a). This is a tedious and labor-intensive process. Classifications vary depending on the attributes and purposes served by the water body. New York, for example, designates fresh waters as, *inter alia*, "Class N" (water free of pollutants that may be enjoyed in its "natural condition"), N.Y. Comp. Codes R. & Regs. tit. 6, § 701.2; "Class AA" (water that may be used as a drinking water source after simple disinfection), *id.* § 701.5; "Class B" (water of sufficient quality to allow for contact recreation and fishing), *id.* § 701.7; and "Class D" (water that will allow for fish survival but not fish propagation), *id.* § 701.9.

In addition to designating the uses of each specific water body or stream segment, States are directed by the Act to establish "water quality criteria." 33 U.S.C. § 1313(c)(2)(A). "Criteria are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 C.F.R. § 131.3(b). Like the development

of classifications for each body of water, the establishment and continual updating of a State's science-based water quality criteria is a time-intensive undertaking.

After a State has designated the use and water quality criteria applicable to particular bodies of water, it may issue NPDES permits in particular circumstances pursuant to Section 402 to address any discharges of pollutants from point sources into navigable waters. Such permits may impose limitations intended to prevent violations of the water quality standards applicable to the specific receiving water body affected by the discharge. 33 U.S.C. §§ 1342(a)(1), (2), 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1)(i).

The Act further requires each State to assess its waters and identify each water body that has not yet achieved compliance with the State's water quality standards. 33 U.S.C. §§ 1313(d)(1)(A), (B), 1315. For each non-compliant body, States must develop water pollution budgets and remedial pollutant loading allocations, known as "total maximum daily loads" ("TMDLs"), to address both channeled ("point") and diffuse ("nonpoint") sources of pollutants in an effort to achieve compliance with applicable water quality standards. *Id.* § 1313(d)(1)(C), (D); 40 C.F.R. § 130.7. Once established, the loads assigned to point sources in the TMDL process are incorporated into NPDES permits, as necessary. 40 C.F.R. § 122.44(d)(1)(vii).

Section 401's certification requirement is intended in part to aid in attaining compliance with these water quality standards. *See PUD No. 1*, 511 U.S. at 712-14; *see also id.* at 720 (observing that "concern with the flowage effects of dams and other diversions is . . . embodied in the EPA regulations, which expressly require existing dams to be operated to attain designated uses" (citing 40 C.F.R. § 131.10(g)(4))); *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 293 (D.C. Cir. 2003)

("The required certification must provide that such discharge will comply with the applicable water quality standards."). Indeed, the express language of Section 401 erases any doubt about the importance Congress placed on the certification requirement: 33 U.S.C. § 1341(a)(1), by reference to 33 U.S.C. § 1313, requires that any applicant for a federal license or permit "shall" provide FERC with a certification from the State that "any . . . discharge will comply with" state water quality standards.

To adopt a cramped reading of Section 401 that effectively removes the activities of hydroelectric dam facilities from the scope of the certification process would subvert Congress' intent to allow the States to assess for themselves whether federally-licensed activities violate the state water quality standards promulgated pursuant to the Act. It would make little sense for the Act to direct States to devise complex and costly water quality standards if, at the same time, the Act were also to place a huge swath of federally-licensed activities that adversely affect water quality – those of hydroelectric dam facilities – beyond the reach of effective state efforts to enforce those standards.

C. Section 401's Legislative History Demonstrates that Congress Specifically Intended It to Apply to Hydroelectric Dams Licensed by FERC.

Despite the clear language of the statute, Petitioner insists that Section 401's use of the term "any discharge" is confined to a "discharge of a pollutant," and that Congress never intended Section 401 to apply to hydroelectric dams (Pet. Br. 25-33). The history of Section 401, however, belies these assertions. Congress first provided in 1970 for state certification where there is "any discharge" into navigable waters. *See* Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 102, sec. 21(b), 84 Stat. 91, 108

(amending the Federal Water Pollution Control Act) (the "1970 Act"). But it was not until two years later, in 1972, that Congress first required a NPDES permit of Section 402 for the "discharge of any pollutant." Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, 880 (codified at 33 U.S.C. §§ 1311(a), 1342(a), (b)).[11] That Congress chose to use different statutory language – "discharge of a pollutant," rather than "any discharge" – when later establishing the NPDES permit requirement underscores that the variant terms are not to be given the same meaning. *See Barnhart*, 534 U.S. at 452.

The claim that Congress did not intend Section 401 to apply to hydroelectric dams is also irreconcilable with additional aspects of the provision's legislative history, which demonstrate that the application of Section 401 to dams was explicitly contemplated by the statute's drafters. As noted, the provision that ultimately became Section 401 was first enacted in 1970 as Section 102 of the 1970 Act (amending Section 21(b) of the Federal Water Pollution Control Act) to assure that federally licensed or permitted activities did not contravene state water quality standards.[12] Using language

11. Indeed, nowhere in the entire text of the Water Quality Improvement Act of 1970 is the term "discharge of a pollutant" found. Nor is there any language in that statute suggesting that the term "any discharge" is circumscribed by the requirement that there be an "addition" to the affected water body.

12. There is no dispute (*see* Pet. Br. 29) that Section 21(b) is Section 401's predecessor. Both the Senate and House Reports on the 1972 Clean Water Act explained that "Section 401 is substantially section 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the Federal Water Pollution Control Act." H.R. Rep. No. 92-911 at 121 (1972); *see* S. Rep. No. 92-414, at 69 (1971). The Senate Report describes the few differences between Section 21(b) and its successor, Section 401(a), but none is relevant here. In particular, there is no suggestion that Section 401 applies a different trigger for certification or a narrower definition of "discharge" than was applied by Section 21(b).

substantially the same as Section 401's language at issue here, the amended Section 21(b)(1) provided:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that there is reasonable assurance, as determined by the State . . . that such activity will be conducted in a manner which will not violate applicable water quality standards.

Section 102, sec. 21(b), 84 Stat. at 108.

Senator Muskie, the Chairman of the Subcommittee on Air and Water Pollution that developed the 1970 Act and who served as floor manager of the legislation, at the outset of the debate on the final legislation reported from the Conference Committee and adopted into law, stated as follows:

> This provision may be the most important section of this legislation. *I call the Senate's attention to section 21.* This section requires that any applicant for a Federal license or permit obtain certification of reasonable assurance of compliance with water quality standards from a State before that applicant can receive any license or permit.
>
> Any new industry that intends to locate on the navigable waters of the United States; that needs a permit to build a dock, a discharge pipe, a water-intake pipe, a bridge, or a road across

> Federal lands; that requires a license from the Atomic Energy Commission for a nuclear power plant or *a license from the Federal Power Commission* [FERC's predecessor] *to build a dam will be required to obtain this certification of compliance* with water quality standards.

116 Cong. Rec. 8,984 (1970) (on H.R. 4148 after amendment by the Conference Committee) (emphasis added).[13]

Congressman Fallon, the Chairman of the Committee on Public Works and floor manager of the 1970 Act, during debate on the final legislation as reported from the Conference Committee, likewise stated that the 1970 Act would require that:

> proper certification be received from those who would use our Nation's waters and in the process must obtain a Federal license or permit, that they give reasonable assurance of compliance with water quality standards for a State or States before that applicant can receive any license or permit. *This includes among others a license* from the Atomic Energy Commission for a nuclear powerplant or *for any new dam which requires a license or* [sic] *from the Federal Power Commission*, as well as many other industries which would require a permit to build a dock[,] discharge pipe, a water intake pipe, or a bridge.

116 Cong. Rec. 9332 (1970) (on H.R. 4148 after amendment by the Conference Committee) (emphasis added).

---

13. For purposes of Section 401, there is no basis to distinguish between FERC's licensing of new hydroelectric dams and the licensing of existing dams. Section 401(a)(1) plainly applies to both; (Cont'd)

Similarly, Senator Cooper, the ranking member of the Committee on Public Works from which the 1970 Act originated, with regard to S.7, the earlier Senate version of the 1970 Act, stated:

> Indirectly, the Federal Government contributes to water pollution in its licensing activities over such things as nuclear power plants, *hydroelectric power plants licenced by the Federal Power Commission* and dredge and fill permits issued by the Army Corps of Engineers. . . .
>
> With respect to *Federal licensing activity, the bill S.7 requires that, as a part of the license activity, applicants must furnish certification from the State* and affected States that the activity will comply with applicable water quality standards.

115 Cong. Rec. 28,971 (1969) (emphasis added); *see also* 116 Cong. Rec. 9,005 (1970) (statement of Senator Cooper concerning "significant risks to water quality" associated with "most licenses issued by . . . the Federal Power Commission").

The statements of Senators Muskie and Cooper, as well as that of Congressman Fallon, establish that Congress clearly intended that the inclusion of the term "any discharge" in Section 401 of the Act would encompass the activities of hydroelectric dam facilities.

(Cont'd)

it reaches the "construction or *operation* of facilities." 33 U.S.C. § 1341(a)(1) (emphasis added). Moreover, "refusing to relicense a hydroelectric project would result in the disassembly of the project," as opposed to the preservation of the *status quo*. *American Rivers, Inc. v. FERC*, 129 F.3d 99, 111 (2d Cir. 1997); *see also* 33 U.S.C. § 1341(a)(6) (pre-existing facilities are not exempt from Section 401's certification requirement); *FPL Energy Maine Hydro LLC*, 111 F.E.R.C. P61,104, ¶ 25 (2005) ("relicensing is an activity that may result in a discharge because, without a new license, the discharge will not be authorized to continue").

II. THIS COURT'S ANALYSIS OF SECTION 401 IN *PUD No. 1*, NOT ITS DISCUSSION OF SECTION 402 IN *MICCOSUKEE*, IS RELEVANT TO WHETHER THE OPERATION OF A HYDROELECTRIC DAM MAY RESULT IN A DISCHARGE FOR PURPOSES OF SECTION 401.

This Court's decision in *PUD No.1* makes clear that the operation of the hydroelectric dams presently under review results in a "discharge" within the meaning of Section 401 of the Act. Petitioner's effort to draw the Court's attention instead to *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), is misplaced because that case concerns a different provision of the Act, Section 402.

A. *PUD No. 1* Confirms that Hydroelectric Dams Cause a Section 401 "Discharge."

Like this case, *PUD No. 1* involved a state certification for a hydroelectric dam issued pursuant to Section 401. *See* 511 U.S. at 708-09. Addressing the need for state certification, the Court observed that operation of the dam would result in "the discharge of water at the end of the tailrace after the water has been used to generate electricity." *Id.* at 711. In the Court's view, such "discharge" – the same as that which results from the operation of Petitioner's dams in the present case (*see* Pet. Br. 3-4) – warranted the conclusion that the operators of the dam "were required to obtain a certification from the State pursuant to § 401." 511 U.S. at 711. That reasoning should control here.

The petitioners in *PUD No. 1* did not dispute that the discharge of water from the tailrace constituted "any discharge" for purposes of Section 401. *See id.* at 711

("Petitioners concede that, at a minimum, the project will result in two possible discharges . . . ."). Significantly, however, the Court did not assume *arguendo* that a hydroelectric dam required state certification under Section 401. Rather, it stated unequivocally — and, in the first instance, without reference to the petitioners' concession of the point — that "because the [hydroelectric dam] project may result in discharges into the Dosewallips River, petitioners are . . . required to obtain state certification of the project pursuant to § 401." *Id.* at 709. Only when the Court later reiterated the need for state certification did it observe that there was "no dispute" as to that need. *Id.* at 711.

The Court's conclusion that the activity of a hydroelectric dam facility results in a Section 401 "discharge" cannot reasonably be dismissed as dicta (*cf.* Pet. Br. 22 n.4). As the Court held in *PUD No. 1*, the existence of a "discharge" is a necessary predicate to a State's exercise of certification authority under Section 401: "Section 401(a)(1) identifies the category of activities subject to certification — namely, those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." 511 U.S. at 711-12. Thus, the Court's determination that a discharge was indeed present was a necessary "threshold condition" to *PUD No. 1*'s ultimate conclusion that the certification challenged there was permissible. The Court's construction of Section 401 as including discharges from hydroelectric dams should be given *stare decisis* effect. *See, e.g., California v. FERC*, 495 U.S. 490, 499-501 (1990) (adhering to precedent where

Court's previous "limited reading" of statute was "necessary for, and integral to" its prior conclusion).[14]

B. *Miccosukee*'s Analysis of Section 402's Narrower Standard, "Discharge of Pollutants," Is Not Relevant Here.

Petitioner's reliance (Pet. Br. 20-21) on *Miccosukee* is misplaced. *Miccosukee* did not involve the certification requirement of Section 401 implicated by "any discharge," but rather Section 402's NPDES permit requirement for point source "discharges of pollutants," a term more narrowly drawn than the open-ended "discharge" referenced in Section 401.

Because the statutory definition of "discharge of pollutants" under Section 402 expressly requires some "addition" to navigable waters, *see* 33 U.S.C. § 1362(12), this Court in *Miccosukee* inquired whether the "pollutants" at issue there were already within the subject water body, or whether they were added, via a point source, from a "meaningfully distinct" water body. 541 U.S. at 109-112. But that inquiry is not relevant to the Section 401 analysis required here, because as discussed in Point I.A., *supra*, Section 401's use of the term "any discharge" does not require that there be an "addition" to any navigable waters. Thus, state certification may be required under Section 401 even

14. The dissenting opinion in *PUD No. 1* also construed the statutory term "discharge" in a manner that encompasses the discharge of water from a dam. *See* 511 U.S. at 725 (Thomas, J., dissenting) ("The term 'discharge' is not defined in the CWA, but its plain and ordinary meaning suggests 'a flowing or issuing out,' or 'something that is emitted.'"(quoting Webster's Ninth Collegiate Dictionary 360 (1991))). Nowhere did the dissenting opinion suggest that an "addition" is a necessary element of any "discharge," or that the definition of "discharge of a pollutant" somehow circumscribes the full extent of the term "discharge."

where there has been no addition of a pollutant — or anything else — from a distinct water body.[15]

Instead of looking to *Miccosukee* for guidance, this Court should adhere to the understanding of Section 401 developed in *PUD No. 1*. Had Congress intended, as Petitioner contends, to define Section 401's use of the term "any discharge" to require some addition to a water body, it easily could have done so, as it in fact did in defining "discharge of pollutants" for purposes of Section 402. *See* 33 U.S.C. § 1362(12). But Congress placed no such limitation on Section 401's threshold condition for state certification, and with good reason. As explained in Point I.B.2, *supra*, the state water quality standards safeguarded by Section 401 are jeopardized not only by "additions" but by "any activity" – such as the operation of hydroelectric dam – that may degrade the chemical, biological, and physical integrity of affected waters. Petitioner's effort to import *Miccosukee*'s construction of Section 402 to the distinct and more expansive language of Section 401 misses this critical point. If Petitioner's arguments are accepted, the States will be left with no means to confront potentially devastating threats to water quality standards, and Congress' express policy recognizing the States' "primary responsibilities and rights" of preventing water "pollution" will be thwarted. 33 U.S.C. § 1251(b).

---

15. For this reason, *Consumers Power* and *Gorsuch* are inapposite, contrary to Petitioner's assertion. *See* Pet. Br. 23, 25. Those cases grappled with the application of Section 402's permit requirement to dams, where an "addition" is required by the text of the statute setting forth the NPDES permit requirement for point sources of pollutants. *See* 33 U.S.C. §§ 1342, 1362(12). However, no "addition" is necessary to trigger the certification process of Section 401. *See supra*, Point I.A.

CONCLUSION

For the foregoing reasons, the judgment of the Maine Supreme Judicial Court should be affirmed.

Respectfully submitted,

ROB McKENNA
Attorney General of Washington
BRIAN FALLER
Assistant Attorney General
RON LAVIGNE
Assistant Attorney General
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504
(360) 753-6245

ELIOT SPITZER
Attorney General of the State of New York
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8020

CAITLIN J. HALLIGAN*
Solicitor General
ROBERT H. EASTON
Deputy Solicitor General
PETER H. LEHNER
Chief, Environmental Protection Bureau
GREGORY SILBERT
Assistant Solicitor General
JAMES M. TIERNEY
Assistant Attorney General

* *Counsel of Record*

DAVID W. MÁRQUEZ
Attorney General
State of Alaska
P.O. Box 110300
Juneau, AK 99811
(907) 465-2133

TERRY GODDARD
Attorney General
State of Arizona
1275 West Washington Street
Phoenix, AZ 85007
(602) 542-4266

BILL LOCKYER
Attorney General
State of California
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244
(916) 323-1996

RICHARD BLUMENTHAL
Attorney General
of Connecticut
Office of the Attorney General
55 Elm Street
Hartford, CT 06106
(860) 808-5318

CARL C. DANBERG
Attorney General
State of Delaware
820 N. French Street
Wilmington, DE 19801
(302) 577-8400

MARK J. BENNETT
Attorney General of Hawaii
425 Queen St.
Honolulu, HI 96813
(808) 586-1500

LISA MADIGAN
Attorney General of Illinois
Office of the Illinois
Attorney General
100 West Randolph Street,
12th Floor
Chicago, IL 60601
(312) 814-3000

THOMAS J. MILLER
Iowa Attorney General
1305 E. Walnut Street
Des Moines, IA 50319
(515) 281-8373

GREGORY D. STUMBO
Attorney General
Commonwealth of Kentucky
1024 Capital Center Drive
Frankfort, KY 40601
(502) 696-5300

CHARLES C. FOTI, JR.
Attorney General
Louisiana Department of Justice
P.O. Box 94005
Baton Rouge, LA 70804
(225) 326-6705

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
200 St. Paul Place
Baltimore, MD 21202
(410) 576-6300

THOMAS F. REILLY
Attorney General of Massachusetts
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-2200

MICHAEL A. COX
Michigan Attorney General
P.O. Box 30212
Lansing, MI 48909
(517) 373-1110

MIKE HATCH
Attorney General of Minnesota
102 State Capitol
St. Paul, MN 55155
(651) 297-4272

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101
(573) 751-3321

MIKE McGRATH
Attorney General of Montana
P.O. Box 201401
Helena, MT 50620
(406) 444-2026

GEORGE J. CHANOS
Attorney General of Nevada
Office of the Attorney General
Nevada Department of Justice
100 North Carson Street
Carson City, NV 89701
(775) 684-1112

KELLY A. AYOTTE
Attorney General of New Hampshire
33 Capitol Street
Concord, NH 03301
(603) 271-3658

PETER C. HARVEY
Attorney General of New Jersey
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 080
Trenton, NJ 08625
(609) 292-8576

PATRICIA A. MADRID
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6000

ROY COOPER
Attorney General of North Carolina
North Carolina Department of Justice
PO Box 629
Raleigh, NC 27602
(919) 716-6400

W.A. DREW EDMONDSON
Attorney General of Oklahoma
2300 N. Lincoln Boulevard, Suite 112
Oklahoma City, OK 73105
(405) 521-3921

HARDY MYERS
Attorney General State of Oregon
1162 Court St. N.E.
Salem, OR 97301
(503) 378-6002

SUSAN SHINKMAN
Chief Counsel
WILLIAM S. CUMINGS, JR.
Assistant Counsel
Pennsylvania Department of Environmental Protection
400 Market Street
Harrisburg, PA 17101-2301
(717) 787-6835

ROBERTO J. SÁNCHEZ RAMOS
Secretary of Justice
Commonwealth of Puerto Rico
P.O. Box 9020192
San Juan, PR 00902-0192
(787) 721-2900

PATRICK C. LYNCH
Attorney General Rhode Island
150 South Main Street
Providence, RI 02903
(401) 274-4400

HENRY McMASTER
Attorney General of South Carolina
Robert C. Dennis Office Building
Post Office Box 11549
Columbia, SC 29211-1549
(803) 724-3970

LAWRENCE E. LONG
Attorney General of South Dakota
1302 East Highway 14, Suite 1
Pierre, SD 57501
(605) 773-3215

PATRICK C. LYNCH
Attorney General of Rhode Island
150 South Main Street
Providence, RI 02903
(401) 274-4400

PAUL G. SUMMERS
Attorney General of the State of Tennessee
P.O. Box 20207
Nashville, TN 37202
(615) 741-3491

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114
(801) 538-9600

WILLIAM H. SORRELL
Attorney General of Vermont
Office of the Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-3173

DARRELL V. McGRAW, JR.
Attorney General of West Virginia
Office of the Attorney General
State Capitol, Room 26-E
Charleston, WV 25305
(304) 558-2021

PEGGY A. LAUTENSCHLAGER
Attorney General of Wisconsin
Wisconsin Department of Justice
17 West Main Street
Madison, WI 53707
(608) 266-1221

M. CAROL BAMBERY
Association Counsel International Ass'n of Fish and Wildlife Agencies
444 N. Capitol Street, NW
Suite 725
Washington, DC 20001
(202) 624-3687

Supreme Court, U.S.
FILED
NOV 22 2005
OFFICE OF THE CLERK

No. 04-1527

In The Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

vs.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Writ Of Certiorari To The Maine Supreme Judicial Court

BRIEF OF AMICUS CURIAE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT IN SUPPORT OF PETITIONER

JOHN B. WELDON, JR.
(*Counsel of Record*)
LISA M. MCKNIGHT
SALMON, LEWIS & WELDON, P.L.C.
2850 East Camelback Road, #200
Phoenix, Arizona 85016
(602) 801-9060

Attorneys for Amicus Curiae Salt River Project Agricultural Improvement and Power District

November 22, 2005

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. A "DISCHARGE" UNDER SECTION 401 OF THE CWA REQUIRES AN "ADDITION" OF A SUBSTANCE INTO WATERS OF THE UNITED STATES 5

II. THE *MICCOSUKEE* TEST FOR DETERMING WHEN AN ADDTION HAS (OR HAS NOT) OCCURRED IS DISPOSITIVE OF THIS CASE 9

III. THE SJC DID NOT CORRECTLY APPLY THE DISCHARGE TEST 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Alabama Rivers Alliance v. Federal Energy Regulatory Commission, 325 F.3d 290 (D.C. Cir. 2003) 4, 6, 7, 8, 10

Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983) 12

Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York, 273 F.3d 481 (2d Cir. 2001) 10, 11

Dubois v. United States Department of Agriculture, 102 F.3d 1273 (1st Cir. 1996) 12, 13

Greenfield Mills, Inc. v. Macklin, 361 F.3d 934 (7th Cir. 2004) 12

North Carolina v. Federal Energy Regulatory Commission, 112 F.3d 1175 (D.C. Cir. 1997) 4, 6, 7, 8, 10

PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994) 6

S.D. Warren Co. v. Maine Department of Environmental Protection, 868 A.2d 210 (Me. 2005) 4, 12

South Florida Water Management District v. Miccosukee, 541 U.S. 95 (2004) ..... *passim*

STATUTES

33 U.S.C. § 1311(a) 2

33 U.S.C. § 1341(a) 3

33 U.S.C. § 1341(a)(1) 5, 7

33 U.S.C. § 1342 2

33 U.S.C. § 1362(12) 5

33 U.S.C. § 1362(16) 5

TABLE OF AUTHORITIES – Continued

Page

Section 301(a) of the Clean Water Act 2

Section 401 of the Clean Water Act..... *passim*

Section 401(a) of the Clean Water Act 3, 4, 6, 7, 15

Section 401(a)(1) of the Clean Water Act..... 7

Section 402 of the Clean Water Act..... *passim*

Section 404 of the Clean Water Act..... 12

RULES

Rule 37.4, Rules of the Supreme Court of the United States..... 1

BRIEF OF AMICUS CURIAE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Amicus curiae Salt River Project Agricultural Improvement and Power District (the "District"), a political subdivision of the State of Arizona, is the operator of the Salt River Federal Reclamation Project ("SRP"), one of the nation's oldest federal reclamation projects.[1] Pursuant to various contracts with the United States Secretary of the Interior, the District operates six dams and reservoirs located on the Salt and Verde Rivers in central Arizona, which impound runoff from a 13,000-square mile watershed. The water stored in these reservoirs is delivered via SRP canals, laterals and pipelines to municipal, industrial and agricultural water users in the Phoenix metropolitan area. In addition, the District operates numerous electrical generating, transmission and distribution facilities, which provide power to nearly 800,000 consumers in the Phoenix area, as well as other rural areas of the state.

Four of the six dams operated by the District are operated for hydropower generation, as well as water storage purposes. Hydropower accounts for only 1.2% of the power resources generated by the District; however, because hydropower is inexpensive to generate, it is a highly valued resource. Hydropower is generated when water stored behind SRP dams flows through a control

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[1] Because the District is a political subdivision of the State of Arizona and this brief is sponsored by its authorized law officer, consent to file this brief was neither sought nor required under Rule 37.4, Rules of the Supreme Court of the United States.

gate at the base of the dam, passes through a turbine, and then flows through an outflow tunnel in the dam into the river downstream. No substances are added to the water passing through SRP's hydropower generation facilities.

At present, the District's hydropower generation activities are not subject to the state certification requirements of Section 401 of the Clean Water Act ("CWA"). Section 401 of the CWA applies only to activities for which a federal permit or license is required, which may result in any discharge into waters of the United States. The District is not required to obtain a permit from the Federal Energy Regulatory Commission ("FERC") for the operation of its hydropower dams, as these facilities are instead subject to the regulatory authority of the United States Bureau of Reclamation. Moreover, to date, no one has suggested that the District's hydropower operations may result in a "discharge" of a substance subject to regulation under any provision of the CWA. This case calls into question whether hydropower operations such as the District's, which are common throughout the United States, do, in fact, result in a "discharge," as that term is used in Section 401, as well as other sections of the CWA.[2] The District has a strong interest in obtaining a clear ruling from the Court that the passage of water through a hydropower dam does *not* result in a discharge under the CWA, where the water bodies above and below the dam

[2] For example, under Section 402 of the CWA, a National Pollution Discharge Elimination System ("NPDES") permit is required for the "discharge of a pollutant." 33 U.S.C. § 1342. Section 301(a) of the CWA provides that, in the absence of an NPDES permit, "the discharge of any pollutant by any person [is] unlawful." 33 U.S.C. § 1311(a).

are not meaningfully distinct and no other substance is added to the water during the hydrogeneration process.

SUMMARY OF ARGUMENT

The generation of hydropower through the Petitioner's dams is not an activity that may result in "any discharge," as that term is understood under Section 401(a) of the CWA, 33 U.S.C. § 1341(a). The Supreme Judicial Court of Maine ("SJC") erred in holding otherwise. An essential element of a "discharge" under the CWA is the addition of a substance or substances into navigable waters. In its recent decision in *South Florida Water Management Dist. v. Miccosukee*, 541 U.S. 95, 109 (2004), this Court held that the mere pumping of water from one part of a water body into another part of the same water body does not constitute an "addition" of pollutants into navigable waters for purposes of Section 402 of the CWA. In the absence of an "addition," this Court held that there could be no "discharge of pollutants" under Section 402.

This Court's construction of the term "addition" in *Miccosukee*, a Section 402 case, is equally applicable to this case, which arises in the context of Section 401. A "discharge" under Section 401 of the CWA can only occur if an "addition" of a substance or substances is made into navigable waters. An addition is, therefore, an essential component of a discharge for purposes of Section 401, as well as Section 402, of the CWA.

Applying this Court's construction of the term "addition" in *Miccosukee* to the facts of this case, it is clear that the Petitioner's operations do not result in an "addition" of a substance into the waters of the Presumpscot River. No

party disputes that the water entering the Petitioner's hydropower dams is part of the same water body as that to which it returns, and the SJC, in passing on the case, acknowledged that the Petitioner's operations do not "add" more water to the river. *S.D. Warren Co. v. Maine Dep't of Environmental Protection*, 868 A.2d 210, 216 (Me. 2005). There is also no evidence that any other substance or substances will be added to the water as a result of the hydrogeneration process. Based on these facts, there is no addition, and, consequently, no discharge, and the Petitioner's hydropower generation activities are not subject to state certification requirements under Section 401(a) of the CWA.

ARGUMENT

The controlling issue presented by this case concerns the meaning of the term "addition," which is an integral element of a "discharge," as that term is understood for purposes of applying Section 401 of the CWA. Relatively few court decisions have interpreted the terms "addition" and "discharge" in the context of Section 401.[3] While resolving the specific facts in issue, these cases have failed to provide broader guidance, much less definitive criteria, for determining whether a particular activity or class of activities does (or does not) constitute an "addition." By contrast, recent court decisions issued in the context of Section 402, including, most notably, this Court's decision

[3] *See Alabama Rivers Alliance v. Fed. Energy Regulatory Comm'n*, 325 F.3d 290, 299 (D.C. Cir. 2003); *North Carolina v. Fed. Energy Regulatory Comm'n*, 112 F.3d 1175, 1187 (D.C. Cir. 1997).

in *Miccosukee, supra*, provide better direction in interpreting the term "addition" and are dispositive of the issues in this case.

I. A "DISCHARGE" UNDER SECTION 401 OF THE CWA REQUIRES AN "ADDITION" OF A SUBSTANCE INTO WATERS OF THE UNITED STATES.

Under Section 401, a party seeking a federal permit or license to conduct an activity that "may result in any discharge into the navigable waters" must first obtain certification from the state in which the discharge will occur that the activity meets the respective state's water quality standards. 33 U.S.C. § 1341(a)(1). The CWA does not expressly define the term "discharge," but merely states that, when used without a qualifying term, a discharge "includes a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16). The term "discharge of a pollutant" is in turn defined as "(A) any *addition* of any pollutant to navigable waters from any point source, (B) any *addition* of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." *Id.*; *see* 33 U.S.C. § 1362(12) (italics added).

Relying upon the statutory reference to an "addition," used in conjunction with the definition of the term "discharge of a pollutant," the United States Court of Appeals for the District of Columbia Circuit has twice concluded that an "addition" is an essential element of a "discharge"

under Section 401 of the CWA.[4] *See Alabama Rivers Alliance*, 325 F.3d at 299; *North Carolina*, 112 F.3d at 1187.

North Carolina was the first of the two decisions by the District of Columbia Circuit interpreting the term "discharge" for purposes of Section 401. *North Carolina* concerned the proposed amendment to an existing FERC license for a hydropower project operated within a lake on the Roanoke River. *North Carolina*, 112 F.3d at 1180. Under the amendment, water would be withdrawn from within the boundaries of the hydropower project for subsequent use by the City of Virginia Beach. *Id.* The withdrawals would result in a decrease in the amount of water passing through the hydropower project's dams. *Id.* at 1181. No water or any other substance would be added to the lake. *Id.* at 1187.

The court in *North Carolina* was called upon to decide whether the withdrawals proposed by the license amendment constituted a "discharge" within the meaning of Section 401(a), thereby triggering state certification

[4] No previous cases decided by this Court have construed whether the term "any discharge," as it is used in Section 401 of the CWA, includes the passage of water through hydropower facilities. In *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), this Court considered the extent of a state's authority under Section 401 to impose water quality standards on federally permitted or licensed activities resulting in a discharge into navigable waters. The Court in *Jefferson County* did not decide whether the petitioners' construction and operation of a hydropower project would result in a discharge subject to Section 401 because the petitioners conceded at the outset that these activities would result in two possible discharges – one based on the release of dredge and fill material during the project's construction and the other resulting from the petitioners' hydropower operations. *Id.* at 711.

requirements. 33 U.S.C. § 1341(a)(1); *Id.* at 1185-86. The court held that "neither the withdrawal of the water from the Lake nor the reduction in the volume of water passing through the dam turbines 'results in a discharge' for purposes of Section 401(a)(1)." *Id.* at 1187.

Noting the absence of an express definition of the term "discharge," the court in *North Carolina* looked to the CWA's definition of "discharge of pollutants" for guidance. The court found that the meaning of the term "discharge of pollutants," used in the application of § 402 of the CWA, was "the nearest evidence we have of definitional intent by Congress" of the meaning of "discharge" in Section 401. *Id.* at 1187. Hence, as the term "discharge of pollutants" is defined to require an "addition," the court concluded that the term "any discharge" under Section 401 likewise requires an "addition." *Id.* at n.4. The proposed withdrawals of water from the lake, while altering the discharge from the project's turbines, did not constitute an addition of a substance or substances.[5] *Id.* at 1188. Accordingly, no "discharge" resulted for purposes of Section 401(a). *Id.*

Six years later, in *Alabama Rivers Alliance*, the District of Columbia Circuit again had occasion to interpret the meaning of the term "discharge," as it is used in Section 401(a) of the CWA. The dispute in *Alabama Rivers Alliance* also arose in connection with a utility company's application to amend the FERC license for the operation of its hydropower dam on the Tallapoosa River. The proposed amendment would allow the replacement of leaking

[5] The court reasoned that "the existence of certification rights under Section 401(a)(1) does not depend on whether a discharge is 'altered.'" *Id.* at 1188. Rather, the court found, the activity sought to be permitted or licensed must actually "result in" a discharge. *Id.*

turbine generators, thereby increasing the flow of water into the river below the dam. 325 F.3d at 293.

The court in *Alabama Rivers Alliance* considered whether this increase in water flows "resulted in a discharge" for purposes of Section 401. *Id.* at 298-99. The court began its analysis with the proposition that, "[r]elying on the definition of 'discharge of a pollutant' and 'discharge of pollutants,' we observed [in *North Carolina*] that 'the word 'discharge' contemplates the *addition*, not the withdrawal, of a substance or substances.'" *Id.* at 299. The court then found that the release of water at an increased rate from the turbines of the dam constituted an "addition" of a substance resulting in a discharge under Section 401. *Id.* at 300. In reaching this conclusion, the court failed to clearly identify what "substance" was being "added" to the river when water already present in the channel passed through the utility company's hydropower dam.

The holding in *Alabama Rivers Alliance* appears to rest superficially on the notion that the mere increase in the rate of releases through a hydropower dam is sufficient to constitute an addition, even when there is no meaningful distinction between the waters entering the dam and those subsequently released downstream. As discussed in the next section of this brief, that notion is at odds with other cases interpreting the term "addition," including this Court's recent decision in *Miccosukee*.

In summary, the decisions in *North Carolina* and *Alabama Rivers Alliance* rightly held that a "discharge" under Section 401 of the CWA requires an "addition" of a substance or substances into navigable waters. But the *North Carolina* and *Alabama Rivers* opinions provide few

parameters, much less a clearly articulated test, for determining whether a particular activity does (or does not) constitute an "addition" within the meaning of Section 401 of the CWA. This Court's recent decision in *Miccosukee*, decided in the context of Section 402, sheds greater light on these issues and is dispositive of the question presented in this case.

II. THE *MICCOSUKEE* TEST FOR DETERMINING WHEN AN ADDITION HAS (OR HAS NOT) OCCURRED IS DISPOSITIVE OF THIS CASE.

The petitioner in *Miccosukee* operated a pumping facility that transferred water from a canal into a wetlands area after traveling through a series of pumps and levees. 541 U.S. at 100-01. Respondents, Miccosukee Tribe of Indians and Friends of the Everglades, challenged the activity, alleging that an NPDES permit was required under Section 402 of the CWA because the pumping of the water from the canal into the wetland area constituted a discharge of pollutants through a point source. *Id.* Among other matters, this Court held that the mere pumping of water from one part of a water body into another part of the same water body does not constitute an "addition" of a pollutant; therefore, no "discharge" occurs for purposes of Section 402 of the CWA. *Id.* at 109. This Court also noted that the Tribe did not dispute that if the canal and wetland area were two parts of the same water body, there was no "addition." *Id.*

In its decision, this Court quoted with approval certain statements from a decision of the United States Court of Appeals for the Second Circuit interpreting the term "addition" in the context of Section 402: "If one takes

a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* at 110 (*quoting Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2d Cir. 2001)). This Court then remanded the case and directed the district court to decide whether the canal and the wetland area were "meaningfully distinct water bodies."[6] *Id.* at 112. If not, this Court concluded that the petitioner's activity would not require an NPDES permit under Section 402 of the CWA. *Id.*

Although *Miccosukee* and *Trout Unlimited* were decided in the context of Section 402 of the CWA, the interpretation of the term "addition" rendered by these decisions is directly pertinent to the question presented in this case. The outcome of both cases hinged on the definition of "addition," which is an essential component of the term "discharge" under Section 401, as well as Section 402, of the CWA. *See Alabama Rivers Alliance*, 325 F.3d at 299; *North Carolina*, 112 F.3d at 1187.

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[6] In adopting the "meaningfully distinct water bodies" test, this Court did not decide various differences among the parties and the district court regarding how the relationship between the canal and the wetland area should be assessed. This Court pointed out that while the Tribe's arguments focused on differences in the "biological or ecosystem characteristics" of the waters, the South Florida Management District emphasized "the close hydrological connection between the two." *Id.* at 110. Ignoring the suggestions of both parties, the district court below had determined that the waters in *Miccosukee* were distinct because the transfer of water from one water body to another "'would not occur naturally.'" *Id.* at 110-11 (quoting the decision of the district court). Rather than settling on particular criteria for determining whether waters are meaningfully distinct, this Court instructed the district court to allow further development of the record before again considering the question. *Id.* at 112.

Applying the guidance provided by *Miccosukee* and *Trout Unlimited*, there is no "addition" when water merely passes through a hydropower project in the Presumpscot River. The Petitioner's hydropower generation project consists of a temporary diversion of water from the river and the release of that water into the same water body downstream. The river is a singular body of water to which no other substances are added as a result of the hydrogeneration process. The mere fact that a dam bisects the upstream and downstream portions of the river does not transform these portions into "meaningfully distinct water bodies." The Petitioner's dams do not add any soup, or any other substance, to the proverbial pot. Under this Court's analysis in *Miccosukee*, which adopted the earlier statements of the Second Circuit in *Trout Unlimited*, the Petitioner's activities do not result in an "addition" or, consequently, a discharge, into the waters of the United States; therefore, no state certification under § 401 is required.

III. THE SJC DID NOT CORRECTLY APPLY THE DISCHARGE TEST.

Although the SJC correctly concluded that an "addition" is an essential component to a "discharge" under the CWA, it wrongly held that the Petitioner's operations result in an addition. The SJC conceded that "Warren is not adding more water to the river." 868 A.2d at 216. The SJC also made no finding that the waters flowing in the Presumpscot River upstream from the Petitioner's hydropower dams are "meaningfully distinct" from the waters flowing in the same river downstream from the dams. On these facts, the SJC should have concluded that the Petitioner's operations do not result in an "addition" or,

consequently, a "discharge" under Section 401. But the SJC went in a different direction, holding that because the Petitioner exercised "private control" over the waters of the Presumpscot River during the hydrogeneration process, the Petitioner's dam operations result in a *per se* discharge of a substance into navigable waters.

The SJC began its analysis by stating that "[w]hen a substance is removed from a navigable body of water and then redeposited into that same body of water it constitutes a discharge. . . ."[7] *Id.* at 215. The SJC then added:

> When "water leaves the domain of nature and is subject to private control rather than purely natural processes . . . it has lost its status as waters of the United States." [footnote omitted] *Dubois v. U.S. Department of Agriculture*, 102 F.3d 1273, 1297 (1st Cir. 1996). Because these waters have lost their status as *waters of the United States*, when they are redeposited into the natural course of the river it results in an addition to the *waters of the United States*.

Id. at 215-16. Applying its "private control" theory to the facts in *S.D. Warren*, the SJC held that "a discharge

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[7] The SJC mistakenly relied on two cases to support its misguided conclusion that the mere removal and redeposit of water into the same water body constitutes an "addition." *Id.* at 215. *See Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 949 (7th Cir. 2004); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983). These cases address "dredge and fill" activities subject to Section 404 of the CWA, and, consequently, focus on the addition of some material to the watercourse, rather than simply a conveyance of water through a dam. These cases do not support the SJC's holding that the passage of water through a hydropower dam results in an "addition," because there is no "discharge" of material; rather, in this circumstance, water is merely moving through a dam for the purpose of generating hydropower.

results because Warren's dams remove the water of the river from its natural course, exercise private control over the water and then *add* the water back into the river." *Id.*

The new legal test introduced by the SJC does not stand on firm legal precedent; indeed, it is directly in conflict with this Court's decision in *Miccosukee*. Contrary to the SJC's holding, the *Miccosukee* decision makes clear that the mere removal and redeposit of water into the *same water body does not constitute an addition*, as that term is used in the CWA. The Court in *Miccosukee* did not address the issue of "private control" in its opinion, and instead focused on whether there is a meaningful distinction between the two bodies of water. But, clearly, there was private control over the water in *Miccosukee*, and this Court nevertheless held that there is no "addition" if the bodies of water are not meaningfully distinct.

In embracing the "private control" test, the SJC relied on a single decision of the United States Court of Appeals for the First Circuit. *See Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996). But *Dubois* does not support the SJC's adoption of a *per se* "private control" rule for determining what constitutes an "addition" under the CWA.

In *Dubois*, the First Circuit considered whether the Forest Service violated the CWA by failing to obtain an NPDES permit for the transfer of water from a river to a pond by way of snowmaking pipes. *Id.* at 1296. The parties to the case all agreed that the water from the river contained "pollutants" within the meaning of the CWA. The court therefore considered whether there was an "addition" of pollutants to the pond when water from the river was transferred through the pipes into the pond. *Id.* The

court explicitly noted that the river and pond were not the same body of water, and that "the transfer of water or its contents from the East Branch [River] to Loon Pond would not occur naturally." *Id.* at 1297.

As part of its analysis, the court in *Dubois* did consider that the water would pass through "privately owned" pipes while traveling from the river to the pond and that, through this transmission, pollutants may be added to the pond. *Id.* Yet, the court did not rest its holding on the fact that an addition occurred because the water entered into private control. Rather, it used the notion of private control, in part, as evidence of the fact that the movement of water from the river to the pond was not a natural occurrence, but was made possible only by way of the snowmaking pipes. *Id.*

The controlling facts in *Dubois* are easily distinguishable from those in the present case. Unlike the clearly distinct water bodies at issue in *Dubois*, no one disputes that the water entering the Petitioner's hydropower dams is from the same water body as that into which it is subsequently released. Equally significant, the First Circuit decided *Dubois* before this Court's adoption of the "meaningfully distinct water bodies" test in *Miccosukee*. *Dubois* does not support the SJC's conclusion that the mere passage of Presumpscot River water through the Petitioner's dams constitutes an "addition" triggering state certification requirements under Section 401 of the CWA.

The well-reasoned analysis of this Court in *Miccosukee* stands in stark contrast to the SJC's half-baked application of a *per se* "private control" test for determining what constitutes an "addition" under the CWA. Adoption of the SJC's test would produce the illogical result

that waters of the same stream, bisected only by a dam, are nevertheless indescribably distinct. We urge this Court to reject the "private control" test in favor of the "meaningfully distinct water body" test adopted in *Miccosukee*.

CONCLUSION

The generation of hydropower through the Petitioner's dams does not result in a discharge of a substance into navigable waters for purposes of Section 401(a) of the CWA. An addition is an essential component of any discharge under Section 401. Applying the guidance of this Court in *Miccosukee*, it is clear that the Petitioner's hydropower operations do not constitute an "addition" of a substance resulting in a discharge into the waters of the Presumpscot River. The water entering the Petitioner's hydropower dams is part of the same water body as that to which it returns; further, as the SJC conceded, the Petitioner's operations do not "add" more water to river. There is also no evidence that any other substance or substances will be added to the water as a result of the hydrogeneration process. On these facts, there is no addition, and, consequently, no discharge, and thus, the Petitioner's hydropower generation activities are not subject to state certification requirements under Section 401(a) of the

CWA. Accordingly, SRP respectfully requests that this Court reverse the decision of the SJC.

Respectfully submitted,

JOHN B. WELDON, JR.
(*Counsel of Record*)
LISA M. MCKNIGHT

SALMON, LEWIS & WELDON, P.L.C.
2850 East Camelback Road, #200
Phoenix, Arizona 85016
(602) 801-9060

Attorneys for Amicus Curiae
Salt River Project Agricultural
Improvement and Power District

November 22, 2005

FILED
JAN - 6 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 04-1527

IN THE

Supreme Court of the United States

S.D. WARREN CO.,

Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Writ of Certiorari to the Maine Supreme Judicial Court

BRIEF OF TROUT UNLIMITED, IZAAK WALTON LEAGUE OF AMERICA, ATLANTIC SALMON FEDERATION, FEDERATION OF FLY FISHERS, INC., CALIFORNIA TROUT, OREGON TROUT, WASHINGTON TROUT, AND AMERICAN SPORTFISHING ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

LEON F. SZEPTYCKI,
General Counsel
CHARLTON H. BONHAM,
Senior Attorney
Trout Unlimited
1300 N. 17th St., Suite 500
Arlington VA 22209
(703) 522-0200

JAMES B. DOUGHERTY
Counsel of Record
709 Third St. SW
Washington, D.C. 20024
(202) 488-1140

January 6, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI CURIAE 1

ARGUMENT 5

I HYDROELECTRIC DAMS AND THEIR DISCHARGES DAMAGE THE INTEGRITY OF THE NATION'S WATERS WHILE HARMING NUMEROUS FISH POPULATIONS. 5

A. Hydroelectric Dams Have Numerous Adverse Effects on Fish Habitat, Water Quality, and the Health of Rivers and Streams. 6

1. Elimination of River Habitat. 6
2. Blocking Migration. 7
3. Alterations in Stream Flow Downstream of Dams. 10
4. Temperature Changes. 12
5. Dissolved oxygen and other changes in the chemical composition of the river's water. 13

B. The Impact of Hydroelectric Dams on Rivers and Fish Can Be Catastrophic. 14

II HYDROELECTRIC DAMS ALSO CAUSE VIOLATIONS OF WATER QUALITY STANDARDS, AND WITHOUT SECTION 401 AUTHORITY OVER FERC-LICENSED DAMS, STATES WILL BE UNABLE TO ADDRESS THESE VIOLATIONS. ... 17

III SECTION 401 CERTIFICATION AUTHORITY HAS BEEN FREQUENTLY AND SUCCESSFULLY EMPLOYED BY THE STATES TO PROTECT AND RESTORE WATER QUALITY, FISH POPULATIONS AND RIVER HEALTH. 21

A. States Have Used Their Section 401 Authority Virtually Since the Clean Water Act's Passage. 21

B. Recent Examples Show That States Use Section 401 Certification Authority to Protect and Restore Fish, Water Quality, and River Health. 23

CONCLUSION 27

TABLE OF AUTHORITIES

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PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994) 17, 18, 22

S.D. Warren Co. v. Board of Environmental Protection, 2005 Me. 27 1

Udall v. FPC, 387 U.S. 428 (1967) 7, 14

Statutory Provisions

Clean Water Act section 101, 33 U.S.C. § 1251 17

Clean Water Act section 303, 33 U.S.C. § 1313 ..... 3, 17

Clean Water Act section 401, 33 U.S.C. § 1341 3

Clean Water Act section 518, 33 U.S.C. § 1377(e) 17

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38 Me. Rev. Stat. § 465 (2005) 19, 20

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Regulations

25 Pa. Code § 93.3 (2005) 19

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INTERESTS OF AMICI CURIAE

Amici curiae submit this brief in support of respondent Maine Department of Environmental Protection, and ask the Court to affirm *S.D. Warren Co. v. Board of Environmental Protection*, 2005 Me. 27.[1]

Amici include fish conservation organizations and the sportfishing industry's primary trade association, all of whom have a direct interest in safeguarding the health of waters and fish populations in the United States. *Amici* are filing this brief to highlight the effects of FERC-licensed hydroelectric dams on the health of rivers and fish populations, and the role that section 401 of the Clean Water Act plays in protecting and restoring those valuable natural resources.

Amicus Trout Unlimited ("TU") is a not-for-profit organization whose mission is to preserve, restore and protect North America's trout and salmon fisheries and their watersheds. TU has 145,000 members in the United States organized into more than 450 local chapters. *Amicus* the Atlantic Salmon Federation ("ASF") is an international not-for-profit organization whose mission is to promote the conservation of wild Atlantic salmon. ASF's network of seven regional councils represents more than 150 organizations and 40,000 volunteers. *Amicus* the Federation of Fly Fishers, Inc. ("FFF") is a not-for-profit organization

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[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief. Counsel for respondent and intervenors have filed letters with the Clerk consenting to the filing of this brief. Counsel for petitioner has consented to the filing of this brief, and a letter reflecting that consent has been submitted to the Clerk.

whose mission is conserving, restoring and educating through fly fishing. FFF has as one of its purposes the protection and enhancement of river ecosystems. FFF has over 400 chapters and 13,000 individual members.

Amici California Trout ("CalTrout"), Oregon Trout, and Washington Trout are not-for-profit conservation organizations dedicated to protecting and restoring populations of resident trout, steelhead, Pacific salmon, and the rivers in which they live, in their respective states. Collectively, these organizations have over 9,000 individual members and more than fifty affiliated angling clubs.

The Izaak Walton League of America ("IWL") is a national conservation organization with 50,000 members. Its mission includes to conserve, maintain, protect and restore the soil, forest, water, and other natural resources of the United States. Members of the Izaak Walton League fish in rivers affected by FERC-licensed hydroelectric dams.

TU, ASF, FFF, CalTrout, Oregon Trout, IWL and Washington Trout have collectively participated in dozens of Federal Energy Regulatory Commission ("FERC") licensing and relicensing[2] proceedings for hydroelectric dams with the goal of protecting and restoring fish populations and river health. All of these *amici* have members who fish for trout, salmon, and other fish in rivers affected by FERC-licensed hydroelectric dams.

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[2] *Amici* use the terms "licensing" and "relicensing" in this brief. Licensing generally refers to all FERC proceedings to license hydropower projects, whether new projects or existing projects. Relicensing is the more specific term, referring to proceedings for new licenses for existing facilities, which owners of such facilities must undergo periodically under the Federal Power Act ("FPA").

The American Sportfishing Association ("ASA") is the sportfishing industry's trade association. ASA's members are a variety of entities whose products, services or activities are related to sportfishing, including manufacturers, resource managers, conservation groups, the media, and those involved in the sale and distribution of fishing tackle and other sportfishing products. ASA safeguards and promotes the enduring social, economic, and conservation values of sportfishing and has members in all fifty states. ASA's mission includes ensuring healthy and sustainable fisheries, advocating for the interests of our members and the country's over 44 million anglers, and maintaining and enhancing the growth of the sportfishing industry. The interests of ASA and its members are directly affected by the health of fisheries in rivers below FERC-licensed hydroelectric dams.

SUMMARY OF ARGUMENT

Hydroelectric dams cause profound damage to fish populations and to the health of rivers. Hydroelectric dams have been responsible for the destruction of numerous runs of salmon and other migratory fish species on both coasts, and have impaired populations of resident fish as well. This brief explains the numerous mechanisms by which such dams impair water quality, damage rivers, and ultimately harm fish populations. Many of the adverse effects of hydroelectric dams also cause violations of water quality standards that states establish and administer under section 303 of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1313.

The certification authority that Congress granted to the states in section 401 of the Act, 33 U.S.C. § 1341, represents the principal means by which states defend the integrity of their waters from the damaging effects of FERC-licensed

hydroelectric dams and fulfill their role under the Act to achieve water quality standards in rivers affected by those dams. States have used their section 401 authority in FERC hydroelectric licensings to protect and restore water quality and the health of numerous fish populations around the country for decades.

Petitioner's argument would effectively eliminate section 401 certification authority in FERC hydroelectric relicensings, leaving states with no recourse to address the serious violations of water quality standards caused by FERC-licensed dams. This argument is contrary to the language, structure, and intent of the CWA. Accepting petitioner's argument and reversing the judgment below would also jeopardize the future of many fish populations across the Nation in rivers with FERC-licensed dams.

ARGUMENT

I
HYDROELECTRIC DAMS AND THEIR DISCHARGES DAMAGE THE INTEGRITY OF THE NATION'S WATERS WHILE HARMING NUMEROUS FISH POPULATIONS.

The purposes of this brief are to describe the impact of hydroelectric dams on water quality, fish populations, and rivers, and describe the critical role that section 401 certifications of hydroelectric licenses play in protecting and restoring fish populations. This brief will not discuss the legal reasons why discharges from FERC-licensed hydroelectric dams require certification under section 401.

However, petitioner's argument that the State of Maine's authority under section 401 does not extend to its hydroelectric dams has severe implications for water quality and the health of fish populations in the Nation. The essence of petitioner's argument is that an existing hydroelectric dam does not cause any discharge because it does not add anything new into the river. On the contrary, hydroelectric dams damage water quality and the overall health of the rivers that they dam, and often discharge water that is profoundly different (or new in character) than water that would flow in the river naturally without the dam in place. If accepted, petitioner's argument would also have extremely broad practical ramifications, given that "[FERC] currently regulates over 1,600 hydroelectric projects at over 2,000 dams pursuant to Part I of the Federal Power Act." FERC, *Report On Hydroelectric Licensing Policies, Procedures, & Regulations, Comprehensive Review & Recommendations*

Pursuant to Section 603 of the Energy Act of 2000 at 7 (May 2001) (hereinafter "FERC 603 Report").[3]

A. Hydroelectric Dams Have Numerous Adverse Effects on Fish Habitat, Water Quality, and the Health of Rivers and Streams.

It is well accepted that hydroelectric dams, including FERC-licensed dams, have done considerable damage to the Nation's rivers and their fish populations. *See, e.g., American Rivers v. FERC*, 372 F.3d 413, 416-17 (D.C. Cir. 2004) ("It is not disputed that hydropower projects have contributed to declining populations of anadromous fish -- namely, salmon and steelhead trout species -- in the Snake River and the Columbia River basin.") (citations omitted); National Research Council Committee on Atlantic Salmon in Maine, *Atlantic Salmon in Maine* 70 (2004) (noting "[d]ams are a major cause of salmon declines worldwide") (hereinafter "*Atlantic Salmon in Maine*"); L. Poff & D. Hart, *How Dams Vary and Why it Matters for the Emerging Science of Dam Removal*, 52 BioScience 659, 659-60 (2002) (hereinafter "*How Dams Vary*"). As petitioner expressly admits, the dams at issue in this case are no exception. *See* Brief for Petitioner at 4.

1. Elimination of River Habitat.

Every hydroelectric dam that creates an impoundment also destroys natural river habitat. *See Atlantic Salmon in Maine* at 70; H. John Heinz Center, *Dam Removal Science and Decisionmaking* 137-38 (2002) (hereinafter "*Dam*

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[3] *Available at* <http://www.ferc.gov/legal/maj-ord-reg/land-docs/ortc_final.pdf> (last visited Dec. 28, 2005). A FERC "project" includes all dams, conveyances, facilities, and infrastructure or other features under license.

Removal Science and Decisionmaking"); National Research Council Committee on Protection and Management of Pacific Northwest Anadromous Salmonids, *Upstream: Salmon and Society in the Pacific Northwest* 9-10, 231 (1996) (hereinafter "*Upstream: Salmon and Society in the Pacific Northwest*"). When a dam impounds a river, the river's features such as riffles, swiftly flowing water, rapids, and pools disappear beneath the impoundment's deep, slow-moving water. The water body becomes an artificial lake and ceases to be a natural river. This transforms the ecology of the river by substituting a biological community more tolerant of the new, lake-like conditions than the river's native biological community. *See Dam Removal Science and Decisionmaking* at 137-38; *see also Udall v. FPC*, 387 U.S. 428, 440 (1967) ("The ecology of a river is different from the ecology of a reservoir built behind a dam.") (requiring review of alternatives during licensing decision for new project); California Energy Commission, *Staff Report, California Hydropower System: Energy and Environment, Appendix D, 2003 Environmental Report*, D-15 (Oct. 2003) ("Dams and impoundments, including hydropower and multiuse dams, have led to the loss of 90 percent of the historic salmonid habitat in the Sierra Nevada.").[4]

2. *Blocking Migration.*

All dams, including hydroelectric dams, create a migration barrier for fish, which is particularly damaging to fish attempting to migrate upstream from the ocean to spawn in freshwater rivers. *See, e.g., Upstream: Salmon and Society in the Pacific Northwest* at 226 ("Dams have been constructed across the migration routes of most Pacific Northwest salmon runs."). Many dams create completely

[4] *Available at* <http://www.energy.ca.gov/reports/2003-10-30_100-03-018.PDF> (last visited Dec. 15, 2005).

insurmountable barriers to upstream migration: "[t]he effect of dams without fish-passage facilities on salmon is clear: the upstream habitat is lost." *Id.* at 231. Blocked fish passage is one of the most prevalent impacts of hydroelectric dams. *See* FERC, Division of Hydropower Administration and Compliance, Office of Energy Projects, *Evaluation of Mitigation Effectiveness At Hydro Power Projects: Fish Passage* 1 (2004).[5]

Although the most obvious barrier is for fish migrating upstream, hydroelectric dams also obstruct fish attempting to migrate downstream. The two most common ways for fish to migrate downstream past a hydroelectric dam are (1) with the flow of water moving through turbines and (2) with flows spilling over the top of the dam. Passing through turbines causes an extremely high level of mortality for migrating fish. *National Wildlife Federation v. NMFS*, 422 F.3d 782, 789 (9th Cir. 2005) (describing downstream passage options and concluding " . . . passage through turbines unquestionably causes the highest mortality rate"). Passing over the top of the dam is considered less damaging than passing through a turbine, but if not managed very carefully can also harm fish. *Id.* Even if fish survive passage over a dam or through a turbine, subsequent mortality rates are still high because either route disorients the fish and makes them very vulnerable to predators. *See* California Energy Commission, *Staff Report, Roadmap For PEIR Research on Fish Passage at California Hydropower Facilities* 9 (Sept. 2005) (citing literature).[6] Passing through a turbine or over a

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[5] *Available at* <http://www.ferc.gov/EventCalendar/Files/20041018094218 -fish-pass-final-report.pdf> (last visited Dec. 15, 2005).

[6] *Available at* <http://www.energy.ca.gov/2005publications/CEC-500-2005-137/CEC-500-2005-137.PDF> (last visited Dec. 15, 2005).

dam is extremely stressful for fish and may produce other adverse effects including descaling, impingement, and bruising. *See Upstream: Salmon and Society in the Pacific Northwest* at 232 (citing literature).

Slow-moving water in impoundments also impedes downstream migration. Species of fish that move downstream when they are juveniles, most notably Atlantic and Pacific salmon that migrate to the ocean, have evolved to do so with natural river currents to conserve energy, and often have adapted to move downstream during periods of high water. The slow water in dammed impoundments requires such fish to expend far greater energy swimming downstream than an undammed river would. *See Atlantic Salmon in Maine* at 70; *Northwest Resource Info. Ctr. v. Northwest Power Planning Council*, 35 F.3d 1371, 1376 (9th Cir. 1994), *cert. denied*, 516 U.S. 806 (1995) ("The river no longer has the strong, swift current needed to carry the smolts rapidly downstream and out to sea.") (quoting H.R. Rep. No. 96-976, pt. I, at 46 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5989, 6044). The trip downstream can double in time because of hydroelectric dams. *Northwest Resource Info. Ctr.*, 35 F.3d at 1376. The extent to which hydroelectric dams obstruct migration is not limited to fish that migrate between freshwater rivers and the ocean – resident trout species are also affected. *See, e.g.*, Peter B. Moyle, *Inland Fishes of California* 51 (2002) ("Even blockage of within-river migrations may create problems.") (noting dams on McCloud River could be the cause of extirpation of bull trout in California) (hereinafter "*Inland Fishes of California*").

3. Alterations in Stream Flow Downstream of Dams.

A hydroelectric dam's essential purpose is to control river flow in order to generate electricity. Hydroelectric dams change water flows in the downstream portion of the river in a variety of ways that harm habitat and fish populations. *See, e.g.*, Jeffery F. Mount, *California Rivers and Streams: The Conflict Between Fluvial Process And Land Use* 329 (1995) (hereinafter "*California Rivers and Streams*") ("The timing of releases may also work against the migratory and spawning habits of anadromous fishes."); University of California, Davis, Center for Water and Wildland Resources, *Status of the Sierra Nevada: Summary of the Sierra Nevada Ecosystem Project Report, Final Report to Congress, Executive Summary* 8 (1996) (concluding that "[d]ams and diversions . . . have profoundly altered streamflow patterns (timing and amount of water) . . . , with significant impacts to aquatic biodiversity").[7]

Many hydroelectric dams (including the dams involved in the present Presumpscot River case) run the river's water through a power canal or tunnel that bypasses the actual river channel, depriving that portion of the river of the water flows it would naturally receive. The portion of the natural river channel that is bypassed, often called the "bypass reach," can be a few hundred yards or many miles long. *See Alcoa Power Generating Co.*, 110 F.E.R.C. ¶ 61,056 (2005) (relicensing of multi-dam project, one of which created a bypass reach of 9.1 miles). Except during periods of very high flow when water goes over the top of the dam, the bypass reach receives only a fraction of normal flows. *See, e.g., Lower Valley Energy, Inc.*, 92 F.E.R.C. ¶ 62,222, 64,322

[7] *Available at* <http://ceres.ca.gov/snep/pubs/es.html> (last visited Dec. 15, 2005).

(2000) (bypass reach for project on Strawberry Creek in Wyoming largely devoid of water approximately 200 days a year); *S.D. Warren Co.*, 58 F.E.R.C. ¶ 62,006, 63,007-09 (1991) (ordering minimum flows in 6,700 foot bypass reach of the Eel Weir project on the Presumpscot River that had previously received minimal leakage flows from the dam). Low flows in the bypass reach severely limit or destroy the river's ability to serve as habitat for fish and other aquatic life. *See, e.g., New York State Gas & Electric Corp.*, 57 F.E.R.C. ¶ 62,138, 63,205-06 (1996) (project previously had eliminated all flows to .8 mile stretch of river causing an absence of all aquatic life); *Midwest Hydraulic Co.*, 79 F.E.R.C. ¶ 61,101, 64,286 (1997) (relicensing of project that had previously dewatered three miles of river bed).

Many hydroelectric dams alter the timing of the release of stored water to generate electricity when demand and prices are highest and thereby maximize the value of generation. *See How Dams Vary* at 660, 661; R.M. Cushman, *Review of the Effects of Rapidly Varying Flows Downstream from Hydroelectric Facilities*, 5 North American Journal of Fisheries Management 330, 330 (1985) (hereinafter "*Effects of Rapidly Varying Flows*"). This pattern of generation is most commonly referred to as "peaking" generation. It produces extreme fluctuations in flows that are dramatically different from the natural flow patterns to which native aquatic organisms have adapted. *See, e.g., How Dams Vary* at 660; *Dam Removal Science and Decisionmaking* at 107; *Effects of Rapidly Varying Flows* at 330-31.

Peaking generation transforms the river on a daily basis. The river flows at unnaturally low levels while the turbines are off, suddenly surges to unnaturally high levels when the turbines go online, and then quickly recedes again when they

are turned off. These rapid and frequent fluctuations impair the ecological health of the river. The documented effects of peaking flows include the following: death and injury to aquatic organisms when they are buffeted by high flows or stranded when flows drop and the river is rapidly dewatered; impairment of rearing habitat for young fish and other species; disruption of the natural life-cycles of many species; and replacement of species specialized to rivers and streams by other species more tolerant of the flow fluctuations. N.L. Poff *et al.*, *The Natural Flow Regime*, 47 BioScience 769, 777 (1997) (citing literature); *Effects of Rapidly Varying Flows* at 331-335 (discussing mechanics of how rapid flow changes affect aquatic life and citing extensive literature).

4. Temperature Changes.

Hydroelectric dams may discharge unnaturally warm or cold water. When a dam creates a shallow impoundment, it unnaturally raises water temperatures in the impoundment because the water slows down and is exposed longer to the sun's warming rays. When a dam converts a river into a deep lake, the water can become "stratified," meaning that the slow moving water near the surface is heated by the sun and becomes unnaturally warm, while deep water becomes unnaturally cold. If the dam discharges water from near the surface, the river downstream will be warmer than it should be naturally; if the dam releases water from deeper in the reservoir, the river will be unnaturally cold. *See Dam Removal Science and Decisionmaking* at 127-28; *How Dams Vary* at 660. In general, the discharge of warmer-than-natural water can impair native cold- and cool-water species, while the discharge of unnaturally cold water can impair native warm-water species. *Id.*; *see also* J. Stanford *et al.*, *The Status of Freshwater Habitats, in* R. Williams (ed.), *Return to the River* 214 (2006).

Unnatural temperature alterations can have a variety of effects on fish. For trout and salmon, increased temperature may adversely influence spawning behavior, delay upstream migration, decrease growth, and indeed cause death. *Inland Fishes of California* at 255; *id.* at 252 ("In some regulated streams, a small change in temperature regime can result in a major change in fish fauna.") (describing effects of FERC-licensed project on the North Fork Feather River). "Thermal alterations potentially affect the survival and growth of virtually *every* stage of the freshwater life cycle." *Upstream: Salmon and Society in the Pacific Northwest* at 192 (emphasis added).

5. Dissolved oxygen and other changes in the chemical composition of the river's water.

A hydroelectric dam can alter the chemical composition of a river's water in a number of ways. For example, "[m]any hydropower projects are unable to meet state water quality standards for [dissolved oxygen]." Mark J. Peterson *et al.*, *Regulatory Approaches for Addressing Dissolved Oxygen Concerns at Hydropower Facilities iv* (2003) (prepared for U.S. Department of Energy).[8] Hydroelectric dams, especially those with deep impoundments, often discharge water with artificially reduced levels of dissolved oxygen, in part because water deep in a reservoir does not mix and interact with air like water flowing down a river. *See, e.g.*, *Dam Removal Science and Decisionmaking* at 127 (deep water in impoundments may be oxygen-poor and even anaerobic); *How Dams Vary* at 660. The discharge of water with little or no dissolved oxygen has an immediate impact on aquatic organisms, which of course rely on dissolved oxygen in water to breathe. *See, e.g.*, C. Coutant & R.

[8] *Available at* <http://hydropower.id.doe.gov/turbines/pdfs/doeid-11071.pdf> (last visited Dec. 18, 2005).

Whitney, *Hydroelectric System Development: Effects on Juvenile and Adult Migration, in* R. Williams (ed.), *Return to the River* 249, 265 (2006) (noting survival of salmon eggs depends on suitable oxygen content).

Although the preceding discussion sets forth the most prevalent and harmful effects of hydroelectric dams on water quality and fish habitat, such dams cause a variety of other adverse effects, including the trapping of all of a river's sediment, the collection and concentration of nutrient pollution, blooms of plankton and algae, and the production of high concentrations of certain dissolved gasses. *California Rivers and Streams* at 316-20; *Dam Removal Science and Decisionmaking* at 126-30; *Portland General Electric Co.*, 111 F.E.R.C. ¶ 61,450, *slip op.* at 85-97 (2005) (section 401 certification in multi-dam relicensing addressing a variety of water quality problems caused by dams).

B. The Impact of Hydroelectric Dams on Rivers and Fish Can Be Catastrophic.

The damage that hydroelectric dams have done to the Nation's fish populations has not escaped the Court's notice. "The destruction of anadromous fish in our western waters is so notorious that we cannot believe that Congress through the [Federal Power Act] authorized their ultimate demise." *Udall*, 387 U.S. at 437-38 (citations and references omitted). Although healthy fish communities exist below some hydroelectric dams, the overall effect of these dams on native fish populations has been destructive and, in some cases, catastrophic.

The rivers of New England, including the Presumpscot, are good examples. Hundreds of thousands of Atlantic salmon once returned from the ocean to spawn in New

England's rivers from the Connecticut River to the Canadian border and sustained robust recreational and commercial fisheries. *See* U.S. Fish and Wildlife Service & National Marine Fisheries Service, *Biological Report on the Status of Atlantic Salmon* §§ 4.1.1, 4.1.2 (1999).[9] When the era of dam building began in the 19th century, salmon populations began disappearing from these rivers, until they were a tiny fraction of historic numbers. *Id.*; *see also Atlantic Salmon in Maine* at 71-74 (listing 19 New England rivers where dam building was followed by significant drops in salmon populations). The Presumpscot River shared this fate: before it was dammed, it hosted healthy runs of Atlantic salmon and other anadromous fish, and the building of dams on the river produced a precipitous collapse of those runs. *See Atlantic Salmon in Maine* at 73; *S.D. Warren Co.*, 58 F.E.R.C. ¶ at 63,009.

Hydroelectric dams have also played a leading role in the steep decline of Pacific salmon populations. Salmon populations in the Columbia Basin have been decimated since the extensive damming of the river. Prior to the dam building era, more than six million – and perhaps as many as sixteen million – salmon swam up the Columbia River during their annual migration from the sea. *Upstream: Salmon and Society in the Pacific Northwest* at 90. Current populations in the basin are estimated to be approximately one-eighth of historical abundance. *Id.* The Columbia River federal hydroelectric system causes about eighty percent of the annual loss of salmon from their once historically robust population numbers in the basin. *Northwest Resource Info. Ctr. v. Northwest Power Planning Council*, 35 F.3d 1371, 1376 (9th Cir. 1994). Construction of dams has utterly eliminated salmon from thirty one percent of their historical

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[9] *Available at* <http://library.fws.gov/salmon/index.html> (last visited Dec. 19, 2005).

habitat (measured in stream miles) in the Columbia Basin. *Upstream: Salmon and Society in the Pacific Northwest* at 63.

Farther south, the picture is equally bleak for salmon. On the Klamath River in Oregon and California, FERC-hydroelectric dams have eliminated salmon and steelhead from approximately 600 miles of historical habitat since 1918. John B. Hamilton *et al.*, *Distribution of Anadromous Fishes in the Upper Klamath River Watershed Prior to Hydropower Dams—A Synthesis of the Historical Evidence*, 3 Fisheries 4, at 10-11 (Apr. 2005); *see also Inland Fishes of California* at 50. Hydroelectric dams have also proliferated in California. For example, "[h]ydro projects are installed on *all but one* of the Sierra Nevada's major river systems." California Energy Commission ("CEC"), *Environmental Performance Report of California's Electric Generation Facilities: A Report to the State Legislature* 32 (July 2001) (emphasis added).[10] In California, the widespread building of hydroelectric dams has caused widespread ecological damage. The CEC has compared the effects of different electrical generation sources upon the state's biological resources and concluded that the effects from hydroelectric power are greater than those from any other source. *Id.* at 31-44 (comparing sources of power generation and discussing substantial impacts of hydropower).

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[10] *Available at* <http://www.energy.ca/gpv/reports/2001-11-20_700-01-001.PDF> (last visited Dec. 15, 2005).

II

HYDROELECTRIC DAMS ALSO CAUSE VIOLATIONS OF WATER QUALITY STANDARDS, AND WITHOUT SECTION 401 AUTHORITY OVER FERC-LICENSED DAMS, STATES WILL BE UNABLE TO ADDRESS THESE VIOLATIONS.

The various impacts of hydroelectric dams discussed above not only damage fish populations; they also violate state water quality standards promulgated under section 303 of the CWA. *See* 33 U.S.C. § 1313. Elimination of section 401 authority will make it more difficult or even impossible for states to achieve these standards and to achieve the overall goals of the Act.[11/]

Among the explicit goals of the Act is to achieve (by 1983) "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." Clean Water Act section 101, 33 U.S.C. § 1251(a)(2). As the Court discussed in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 714 (1994) (hereinafter "*Jefferson County PUD*"), one of the primary mechanisms established by the CWA to achieve this goal is the requirement that states promulgate and implement water quality standards applicable to every water body in the state.

The biological, physical, and chemical effects of hydroelectric dams can cause violations of the provisions of most states' water quality standards. As the *Jefferson County PUD* opinion described in detail, state water quality standards are made up of designated uses that specific

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[11] Under certain circumstances, Indian Tribes also have section 401 certification authority. *See* Clean Water Act section 518, 33 U.S.C. § 1377(e).

segments of water bodies must support, and criteria (both numeric and narrative) for specific forms of pollution applicable to each designated use. *See Jefferson County PUD*, 511 U.S. at 714. The designated uses usually include requirements that the water be usable for activities such as swimming, fishing, and water supply, and also can include requirements that particular water bodies be usable as habitat for certain categories of fish and other aquatic life. *Id.* at 714, 716. States must strive to achieve full compliance with all aspects of their water quality standards. *See* 33 U.S.C. §1313(d); *Jefferson County PUD*, 511 U.S. at 715.

The Court explicitly held in *Jefferson County PUD* that ensuring compliance with state water quality standards is "a proper function of the § 401 certification," *id.* at 712-13, and that a state's section 401 certification may require compliance with "both the designated uses and the water quality criteria of the state standards." *Id.* at 715; *see also id.* at 716. The Court ultimately held that the state of Washington could use its section 401 authority to ensure compliance with use designations of the Dosewallips River as habitat for salmon and include certification terms requiring the release of specific flows from the dam to protect that designated use. *See id.* at 714-15.

The Court was correct to note that Washington's standards are "typical" in their use designation and criteria. *Jefferson County PUD*, 511 U.S. at 716 ("Washington's Class AA water quality standards are typical in that they contain several open-ended criteria which, like the use designation of the river as a fishery, must be translated into specific limitations for individual projects."). Most states have fisheries-related designations and criteria in their standards, and those aspects of their standards can be violated by the numerous effects of hydroelectric dams

discussed in Section I of this brief.[12/] Numeric criteria for specific pollutants do not receive more weight than use designations and criteria, and states must achieve both. *See id.* at 715.

Maine's water quality standards require the state to classify all of its waters into categories reflecting differing levels of designated uses. The state classifies rivers in four classes from Class AA (the highest quality) down to Class C. *See* 38 Me. Rev. Stat. § 465 (2005). All of the classes have designated uses, which for each class includes fishing and "habitat for fish and other aquatic life." *Id.* Each classification also includes an aquatic life standard, which in the case of the two highest categories, requires that "[t]he aquatic life content . . . shall be as naturally occurs." *Id.*

12/ *See, e.g.*, 5 Colo. Code Reg. 1002-31.13(1)(c) (2005) (establishing four aquatic life use designations including two for "waters capable of sustaining a wide variety of [cold/warm] water biota"); Mich. Admin. Code R. 323.1100 (6)-(9) (2005) (designated uses require protection of certain waters as trout fisheries and of others as migratory salmonid habitat); Minn. R. § 7050.0222 (2005) (water's aquatic life and recreation use designation must be "such as to permit the propagation and maintenance of a healthy community of cold water sport or commercial fish and associated aquatic life, and their habitats"); N.H. Admin. Code R. [Env-Ws] 1703.19 (2005) (requiring surface waters to support community of aquatic organisms comparable to that of natural habitats, and that differences with naturally occurring conditions shall be limited); N.J. Admin. Code 7:9B1.12(a)-(g) (establishing six aquatic life use designations, including waters that must be suitable for "maintenance, migration, and propagation of natural and established biota"); Or. Admin. R. 340-041-0002 (2005) (defining uses and referencing specific basin designations where uses include "Core Cold-Water Habitat Use," "Salmon and Steelhead Spawning Use," and "Salmon and Trout Rearing and Migration Use"); 25 Pa. Code § 93.3 (2005) (establishes four aquatic life uses including cold water fishes and migratory fishes); Wis. Admin. Code § N.R. 102.04(3)(a)-(e) (2005) (classification into five different aquatic life uses, including "cold water communities" and "warm water sport fish communities").

Most of the segments of the Presumpscot River that the discharges from petitioner's dams affect are class B waters, for which Maine's standards require that "[a]quatic life in the receiving waters must be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community."[13] *Id.* at § 465(3)(c). The health of indigenous aquatic species found in the Presumpscot River such as eels, salmon, shad, and herring requires fish passage, flows in the bypass reaches, and sufficient water quality. The state's section 401 certification of petitioner's hydroelectric dams addressed all of those issues, and without certification authority the state would have been powerless to ensure compliance with its water quality standards.

When a FERC-licensed hydroelectric dam causes or threatens violations of state water quality standards, a state like Maine has limited options with which to address those violations. Indeed, section 401 is the only tool Congress gave to states in this predicament, and it deliberately designed this authority to be a cornerstone of the CWA's statutory scheme. Accepting petitioner's argument and reversing the ruling below would strip states of one of the primary tools Congress gave them to meet their obligation to achieve water quality standards under the CWA.

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[13] A short portion of the river below Dundee (the upstream most dam involved) is class A, and the river below Saccarapa (the downstream-most) is class C. *See* 38 Me. Rev. Stat. Ann. § 467(9).

III
SECTION 401 CERTIFICATION AUTHORITY HAS BEEN FREQUENTLY AND SUCCESSFULLY EMPLOYED BY THE STATES TO PROTECT AND RESTORE WATER QUALITY, FISH POPULATIONS AND RIVER HEALTH.

A. States Have Used Their Section 401 Authority Virtually Since the Clean Water Act's Passage.

Section 401 of the CWA provides that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters" must obtain, from the state in which the discharge would occur, a certification that the activity will comply with a variety of provisions of the CWA, including state water quality standards promulgated under section 303 of the Act. 33 U.S.C. § 1341(a). Pursuant to the plain language of this provision, section 401 certifications have been a part of FERC licensings and relicensings of hydroelectric dams since the CWA was passed in 1972.

Review of reported FERC decisions shows that hydroelectric license applicants began seeking, and states began issuing, section 401 certifications of their dams very soon after passage of the CWA.[14] Over time, application of the authority has become more sophisticated, and some states

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[14] *See, e.g., Georgia Power Co.*, 9 F.E.R.C. ¶ 62,205, 63,238 n.3 (1979); *Indiana & Michigan Electric Co.*, 58 F.P.C. 2,771, 2,772 (1977); *Brown Company*, 59 F.P.C. 395, 396 (1977); *Potomac Edison Co.*, 56 F.P.C. 3,462, 3,463 (1976); *Idaho Power Company*, 53 F.P.C. 1,004, 1,008 (1975); *Nekoosa Edwards Paper Co.*, 52 F.P.C. 1,020, 1,021 (1974); *Sho-Me Power Corp.*, 53 F.P.C. 1999, 2000-01 (1975); *Puget Sound Power and Light Co.*, 53 F.P.C. 1657 (1975).

have included more conditions in their section 401 certifications designed to help assure compliance with specific state water quality standards. *See infra* at note 17 (citing numerous examples of section 401 certifications of FERC hydroelectric licenses). Although a number of court decisions over the last thirty years have fleshed out the precise contours of section 401, courts, FERC, and other agencies have never questioned the basic requirement of a section 401 certification for a FERC hydroelectric license. *See, e.g., Jefferson County PUD*, 511 U.S. 700 (defining scope of water quality standards a state may seek to enforce in a section 401 certification); *see also American Rivers v. FERC*, 129 F.2d 99 (2d Cir. 1997) (FERC has no authority to reject certain section 401 certification terms); *City of Fredericksburg v. FERC*, 876 F.2d 1109 (4th Cir. 1989) (FERC cannot issue license for hydroelectric project if state denies certification). Petitioner's argument, if sustained, would reverse thirty years of accepted practice in FERC licensings of hydroelectric dams, and would eliminate a critical piece of a complex, interrelated, and well-honed regulatory scheme.

Contrary to claims by several *amici* on behalf of petitioner that section 401 certification conditions are so onerous that they jeopardize our energy security;[15] *FERC itself*, after taking into account *not just* 401 certifications but *the entire* relicensing process has determined that relicensing of hydroelectric dams (which occurs once every thirty to fifty

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[14] *See* Brief for Edison Electric Institute, The American Forest & Paper Ass'n, The American Public Power Ass'n, The National Hydropower Ass'n, and The Utility Water Act Group as *Amici Curiae* In Support Of Petitioner.

years) has led to negligible reductions in electric generating capacity.[16/]

B. Recent Examples Show That States Use Section 401 Certification Authority to Protect and Restore Fish, Water Quality, and River Health.

In numerous FERC hydroelectric relicensings, states have used section 401 authority to require fish passage, changes in flow regime, and other changes in the operation of hydroelectric dams to ensure compliance with water quality standards and to protect and restore fish populations.[17/] Many

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[16] *See* FERC 603 Report at 50 (finding that after relicensing "the average annual generation loss, attributed largely to increased flows to protect aquatic resources, was 1.59 percent, while average installed capacity increased 4.06 percent").

[17] *See, e.g., American Rivers v. FERC*, 129 F.3d 99, 103-04 n.3 (2d Cir. 1997) (three licensings for projects in Vermont where the state issued section 401 certifications with conditions relating to fish passage and minimum flows below dams); *Alcoa Power Generating*, 110 F.E.R.C. ¶ 61,056 (2005) (settlement of multi-dam relicensing in which North Carolina issued section 401 certifications requiring minimum flows and periodic high flows in the Little Tennessee River and one of its principal tributaries in order to restore aquatic life and recreational uses); *FPL Energy Maine Hydro, LLC*, 106 F.E.R.C. ¶ 62,021 (2004) (as part of settlement of relicensing of Indian Pond dam on the Kennebec River in Maine, state issued section 401 certification with conditions related to minimum flows, fish habitat restoration, and fishing flows to protect existing use as brook trout and landlocked salmon fishery); *FPL Energy Maine Hydro LLC*, 101 F.E.R.C. ¶ 62,179 (2002) (settlement of licensing of dams on Rapid River in Maine in which Maine issued a section 401 certification designed to protect high quality brook trout and landlocked salmon fishery, and including conditions related to minimum flows, reservoir levels, and other aspects of fish habitat); *Avista Corp.*, 90 F.E.R.C. ¶ 61,167 (2000) (settlement of complex relicensing of large, multi-dam project in which Montana and Idaho issued section 401 certifications implementing the settlement and addressing a variety of fish habitat and water quality issues, including flows, fish passage, gas

of the *amici* who have submitted this brief have participated in relicensings where a state's use of its section 401 authority has protected or enhanced critical fish populations. In some cases, the state issued the certification over the hydroelectric dam owner's objection. In others, the states issued their section 401 certifications as part of comprehensive relicensing settlements, and consistent with terms parties developed collaboratively. *See supra* note 17.

In addition to the relicensings described in note 17, three examples are particularly illustrative. Trout Unlimited and other angling groups were active participants in FERC's relicensing of five dams on the Housatonic River in Connecticut. *See Northeast Generation Services*, 107 F.E.R.C. ¶ 61,305 (2004). In that case, two of the dams (Falls Village and Bulls Bridge) controlled virtually all of the remaining free-flowing sections of the river in Connecticut. *See id.* at 62,419-20. The Falls Village and Bulls Bridge

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saturation, and sediment); *Holyoke Water Power Co.*, 88 F.E.R.C. ¶ 61,186 (1999) (relicensing of Holyoke dam on the Connecticut River in Massachusetts in which the section 401 certification included conditions related to flows below dam, fish passage, and run-of-river operation to promote recovery of anadromous fish); *Central Maine Power*, 82 F.E.R.C. ¶ 61,187 (1998) (section 401 certification of relicensing of project on the Saco River in Maine incorporated comprehensive settlement of fish passage and flows issues for projects on that river, and included conditions related to minimum flows and fish passage in order to promote restoration of salmon, shad, and river herring); *Summit Hydropower*, 81 F.E.R.C. ¶ 62,089 (1997) (section 401 certification of relicensing of a project on the Quinebaug River in Connecticut requiring fish passage, minimum flows below the dam, and run-of-river operation); *Rochester Gas and Electric Corp.*, 81 F.E.R.C. ¶ 62,064 (1997) (section 401 certification of relicensing included 20 conditions, including run-of-river operation, restrictions on impoundment draw-down, and minimum flows); *Kennebec Water Power Company*, 81 F.E.R.C. ¶ 61,254 (1997) (section 401 certification of relicensing of Moosehead project on upper Kennebec River in Maine included conditions related to minimum flows, ramping rates, and flows during salmonid spawning).

hydroelectric dams were peaking dams and released large amounts of water during the day in the summer, which in turn caused a variety of negative biological effects. *See id.*

The dams caused such dramatic biological effects that the state had listed these sections of the river under section 303(d) of the CWA as impaired because they failed to meet aquatic life standards. *See* Connecticut Department of Environmental Protection, *2004 List of Connecticut Waterbodies Not Meeting Water Quality Standards* at B-26, B-27 (2004).[18] The state issued a section 401 certification for the project that included a variety of conditions for all five dams, among which was the requirement that the Falls Village and Bulls Bridge hydroelectric dams cease peaking generation and be operated as "run-of-river," meaning that flows below the dams would closely resemble flows that would naturally occur in the river. *See Northeast Generation Services*, 107 F.E.R.C. at ¶ 62,441-42. The certification also provided for higher flows in the portions of the river bypassed by the power canals of both dams, in an effort to improve aquatic communities. *See id.* The certification sought to bring these waters into compliance with aquatic life standards and to improve the recreational fishery in the river. FERC had explicitly indicated that, absent the state's section 401 certification, FERC would have allowed continued peaking generation, with some modification, in the new license. *See id.* at 62,422.

On the west coast, several of the *amici* on this brief participated in the relicensing of Pacific Gas & Electric Company's hydroelectric dams on Hat Creek, in northeastern California. *See Pacific Gas & Electric Co.*, 101 F.E.R.C. ¶

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[18] *Available at* <http://www.dep.state.ct.us/wtr/wq/2004_303d_final.pdf> (last visited Dec. 9, 2005).

61,165 (2002). Hat Creek is unquestionably one of the state's most treasured and renowned wild trout recreational fisheries. *See id.* at 61,668 n.22. The project is comprised of two hydroelectric dams that operate in run-of-river mode, like the dams at issue in this case. *See id.* at 61,664.

California had given Hat Creek a use designation of "cold fresh water habitat." *See Water Quality Control Plan (Basin Plan) For The Central Valley Regional Water Quality Control Board, Central Valley Region, 4th ed., The Sacramento River Basin and San Joaquin River Basin* II-5.00 (Sept. 1999) (table of waters and designations, Table II-1).[19] "Cold fresh water habitat" means "uses of water that support cold water ecosystems including, but not limited to, preservation or enhancement of aquatic habitats, vegetation, fish, or wildlife, including invertebrates." *Id.* at II-2.00.

The state of California issued a section 401 certification for the Hat Creek Project that protects and enhances this vital fishery. Among other things, the certification requires continued run-of-river operation, development of an erosion and sediment control plan, continuous minimum instream flow below the dams, and development of a flow gauging program, fish monitoring program, and herbicide-use plan. *Id.* at 61,664-65. As a package, the section 401 certification requirements ensure protection and enhancement of Hat Creek's fish populations and compliance with the state's designated uses.

In Oregon, the Confederated Tribes of the Warm Springs Reservation and the state of Oregon both issued section 401

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[19] *Available at* <http://www.waterboards.ca.gov/centralvalley/available_documents/basin_plans/SacSJR.pdf> (last visited Dec. 15, 2005).

certifications for a relicensing of three hydroelectric dams on the Deschutes River. *See Portland General Electric Co.*, 111 F.E.R.C. ¶ 61,450 (2005). Both certifications were issued as part of a comprehensive settlement of a very complex relicensing, and were focused on protecting and restoring populations of anadromous salmon and steelhead, and resident trout. The terms and conditions of the state's certification addressed many of the habitat and water quality problems associated with the dams, including elevated water temperature, *id. slip op.* at 85-86; low levels of dissolved oxygen in waters discharged from the dams, *id.* at 87-88; pH of waters discharged from the dams, *id.* at 88-90; ramping rates associated with changes in flows discharged from the dams, *id.* at 92; minimum streamflow levels, *id.* at 93; fish passage, *id.*; and levels of dissolved gases in water discharged from the dams, *id.* at 95. Many of these provisions serve the added purpose of addressing certain water quality impairments, which the state is also required to address pursuant to section 303(d) of the CWA. This certification demonstrates in considerable detail the close link between hydroelectric dam operations, the health of fisheries, and potential violations of state water quality standards. *Id.* at 85-86 (temperature), 87-88 (dissolved oxygen), 89 (pH), and 90-91 (phytoplankton growth).

All three of these examples, as well as the examples listed in note 17, *supra*, illustrate the proper functioning of section 401 in FERC hydroelectric relicensings: helping states achieve a variety of components of their water quality standards, particularly those related to the health of fish populations and the river's biological community generally.

CONCLUSION

In this case the State of Maine used section 401 as Congress intended and as other states have used it around the country for years – namely, to ensure that FERC-licensed hydroelectric dams comply with water quality standards, including fish-related designated uses. Without section 401 certification authority over FERC-licensed dams, states will be unable to meet their obligation under the CWA to achieve compliance with those standards in the thousands of water bodies affected by these dams. If this were to happen, our Nation's fish populations and rivers would suffer greatly.

Respectfully submitted,

LEON F. SZEPTYCKI, General Counsel
CHARLTON H. BONHAM, Senior Attorney
Trout Unlimited
1300 N. 17th St., Suite 500
Arlington VA 22209
(703) 522-0200

JAMES B. DOUGHERTY
Counsel of Record
709 Third St. SW
Washington, D.C. 20024
(202) 488-1140

Counsel for *Amici Curiae*

January 6, 2006

(14)

No. 04-1527

Supreme Court, U.S.
FILED
JAN 6 - 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE BOARD OF
ENVIRONMENTAL PROTECTION,

Respondent.

**On Writ Of Certiorari To The
Maine Supreme Judicial Court**

BRIEF FOR AMICUS CURIAE BY UNITED STATES SENATOR JAMES M. JEFFORDS IN SUPPORT OF RESPONDENT

JAMES M. JEFFORDS
United States Senator
Dirksen Senate Office Building
Washington, D.C. 20510
(202) 224-5141

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does this Court's holding last year in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), alter the requirement that the flow of water through an existing dam constitutes a "discharge" under Section 401, 33 U.S.C. § 1341, of the Clean Water Act?

LIST OF PARTIES AND CORPORATE DISCLOSURE

The parties to the appeal are the Petitioner S.D. Warren Company and the Respondent Maine Department of Environmental Protection and Intervenors American Rivers and Friends of the Presumpscot River.

Senator Jeffords represents the state of Vermont in the United States Senate and is neither a for-profit nor a not-for-profit non-governmental entity. Senator Jeffords received assistance in the preparation and printing of this brief from Jon Groveman, Esq., legal counsel for the Vermont Natural Resources Council (VNRC). VNRC is a 501(c)(3) not for profit entity incorporated in Vermont.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND CORPORATE DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	7
ARGUMENT	8
I. CONGRESS INTENDED THAT SECTION 401 OF THE ACT APPLY TO HYDROELECTRIC DAMS AND INTENTIONALLY CREATED A BROADER MORE INCLUSIVE DEFINITION OF DISCHARGE IN SECTION 401 THAN SECTION 402 OF THE ACT	8
A. The Legislative History of Sections 401 and 402 Indicate that the Terms "Discharge" and "Discharge of a Pollutant" Have Distinct Meanings	9
B. Changes in the Definition of "Discharge" During Consideration of the Bill Prove that Congress Intended "Discharge" to Have a Broader Meaning than "Discharge of Pollutants"	11
C. The Definitions of "Discharge" and "Discharge of a Pollutant" Were Not Amended Nor Were Amendments Proposed after Case Law Found them to Have Distinct Meanings	12

TABLE OF CONTENTS – Continued

Page

D. Section 402 Addresses Discharges that Add Pollutants to the Nation's Waters and Section 401 Addresses Activities Harmful to Water Quality that Do Not Involve the Addition of Pollutants 13

II. THE INTENT OF THE CLEAN WATER ACT IS TO ENABLE STATES TO ENSURE COMPLIANCE WITH THEIR DULY ADOPTED WATER QUALITY STANDARDS 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

FEDERAL CASES

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 9

Oregon Natural Desert Association v. Dombeck, 172 F.3d 1092 (9th Cir. 1998), *cert. denied*, 528 U.S. 964 (1999) 12

PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994) 13

South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) 7

FEDERAL STATUTES

33 U.S.C. § 407 10

33 U.S.C. § 1251 et seq 1

33 U.S.C. § 1251(a) 1, 6

33 U.S.C. § 1314(f)(F) 13

33 U.S.C. § 1341(a)(1) 8

33 U.S.C. § 1342(a)(1) 9

33 U.S.C. § 1362(16) 12

42 U.S.C. § 4321 et seq 1

STATE STATUTES

10 V.S.A. § 1263 et seq. 2

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE HISTORY

Environmental Policy Division of the Congressional Research Service of the Library of Congress, 93rd Congress, A Legislative History of the Federal Water Pollution Control Act of 1972 3

S. 2770 ..... 5, 10, 11, 16, 18

H.R. 11896 ..... 10, 12

S. Rep. No. 92-414 ..... 5, 16, 18

S. Rep. No. 92-1236 9

H.R. Rep. No. 91-127 14

H.R. Rep. No. 92-911 ..... 9, 10

115 Cong. Rec. 21 15

116 Cong. Rec. 7 15

117 Cong. Rec. 30 11

118 Cong. Rec. 8 ..... 4, 6, 17

118 Cong. Rec. 25 3

WEBSITES

EPA website, http://www.epa.gov/owow/wetlands/facts/fact24.html 13

INTEREST OF AMICUS CURIAE[1]

The Clean Water Act (Act), 33 U.S.C. § 1251 et seq., is a landmark statute that was adopted during a period of monumental change in our nation's legal environmental landscape. The National Environmental Policy Act, 42 U.S.C. § 4321 et seq., was passed in 1969 and the Clean Water Act quickly followed in 1972. The Act's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the Act regulated the discharge of pollutants into the waters of the United States and gave the federal government, through the Environmental Protection Agency (EPA), the authority to implement pollution control programs for wastewater treatment systems and to establish minimum standards for contaminants in surface waters and to regulate the impacts of federally licensed facilities on waters of the United States.

To understand the significance of the Clean Water Act, recall the contaminated state of our nation's waterways in the early 1970s. Our nation was faced with a water pollution crisis. The most vivid example was the Cuyahoga River in Ohio, which became so polluted with chemicals and industrial wastes that it burst into flames. Toxic materials were routinely dumped into pristine water bodies by industrial polluters. It was standard practice in municipalities to have underground pipes deliver raw

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[1] The parties have consented to the filing of this brief.

Amicus Senator Jeffords received assistance in preparing the brief from John Groveman, Esq. of the Vermont National Resources Counsel (VNRC). In addition, VNRC paid for the printing of the brief.

sewage from homes directly into rivers and streams without any intervening treatment.

In Vermont, the state's growing support for environmental conservation was embodied in the local opposition to the planned construction of several large dams. Along the Moose River in the Northeast Kingdom, the White River at Gaysville, and the Saxtons River at Cambridgeport in southern Vermont, local awareness of the effect of large dams on native fish species, water quality, and woodland habitat led Vermonters to question the wisdom of constructing large flood control dams. During this period, there was very little legal precedent to rely upon to challenge the construction of dams for their effects on water quality, habitat or species.[2]

In 1970, Vermont responded to that void and passed Act 252, the toughest water pollution law in the country at the time. Act 252 gave the citizens of Vermont the basic tools to protect Vermont's waters at the state level. See 10 V.S.A. § 1263 et seq.

In 1972, the Congress passed the Federal Water Pollution Control Act, or the Clean Water Act. The Federal Water Pollution Control Act was originally adopted in 1948. The 1972 Clean Water Act, which was passed by

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[2] Senator Jeffords was Vermont's Attorney General between 1968-1974. In 1970, he worked to pass landmark environmental statutes in Vermont such as Act 252, the state's first water quality statute. As Attorney General, Senator Jeffords championed clean water protection, taking strong enforcement actions against large industry and municipalities to prevent the discharge of pulp and paper sludge, untreated sewage, and warm water into Vermont's water resources. In addition, as Attorney General, Senator Jeffords dealt with many of the legal issues surrounding the construction of proposed dams in Vermont without much legal history in this area to rely on.

wide margins[3] in Congress to override a veto by President Nixon, completely revised the existing statute and created the clean water program that has been in place for 35 years.

Congress clearly intended the 1972 Clean Water Act to be a comprehensive approach to solving our nation's water pollution problems. At that time, Senator Muskie (D-ME)[4] stated:

> *Can we afford clean water? Can we afford rivers and lakes and streams and oceans which continue to make life possible on this planet? Can we afford life itself? The answers are the same. Those questions were never asked as we destroyed the waters of our Nation, and they deserve no answers as we finally move to restore and renew them.*

118 Cong. Rec. 25, 33692 (1972), *reprinted in* Envtl. Policy Div. Cong. Research Serv. Library of Cong., 93rd Cong., A Legislative History of the Federal Water Pollution Control Act of 1972, at 164 (1973.) (*hereinafter*, A Legislative History.)

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[3] Senate vote on S. 2770, November 2, 1971, 86-0; House vote on H.R. 11896, March 29, 1972, 380-14; Senate vote on S. 2770 conference report, October 4, 1972, 74-0; House vote on S. 2770 conference report, October 4, 1972, 366-11; Senate vote to override President Nixon veto, October 17, 1972, 52-12; House vote to override President Nixon veto, October 18, 1972, 247-23.

[4] Senator Ed Muskie (D-ME) served as a state legislator and governor of Maine before coming to the U.S. Senate in 1959. He served on the Public Works Committee, where he chaired the Air and Water Pollution Subcommittee, which was created in 1963 at his request. In 1972, Senator Muskie was the primary sponsor of the Water Quality Improvement Act in the Senate, which became the Federal Water Pollution Control Act of 1972.

Representative Blatnik (D-MN),[5] stated during floor debate:

> *In this measure, we are totally restructuring the water pollution control program and making a far-reaching national commitment to clean water . . .*

118 Cong. Rec. 8, 10204 (1972), *reprinted in* A Legislative History, at 350.

Representative Dingell (D-MI),[6] stated during the same floor debate:

> *The legislation we are considering today – H.R. 11896 – is by far the most far-reaching and comprehensive bill of them all [of the 1965, 1966, and 1970 water pollution control statutes.] It is a complete revision of the Federal Water Pollution Control Act which was first enacted under the leadership of our distinguished colleague from Minnesota, Congressman John A. Blatnik.*

118 Cong. Rec. 8, 10248 (1972), *reprinted in* A Legislative History, at 467.

In addition, the 1972 Clean Water Act represented a "first of its kind" statute that created a federal regulatory

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[5] Representative John Blatnik (D-MN) served in Congress from 1947 to 1974. He was chairman of the Committee on Public Works from 1971-1974, and the Clean Water Act was passed under his leadership.

[6] Representative John Dingell (D-MI) served in the House of Representatives from 1955 to the present. In 1972, he participated actively in the floor debate on the Clean Water Act. Currently, he is the ranking member of the House Energy and Commerce Committee, where he served as chairman from 1981-1994.

program that relied on significant implementation responsibilities delegated to the states. The Committee report accompanying S. 2770, the Senate version of the Water Quality Improvement Act which became the Federal Water Pollution Control Act of 1972, states that:

> *For more than two decades, Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: the States shall lead the national effort to prevent, control, and abate water pollution.*

S. Rep. No. 92-414, at 146 (1971), *reprinted in* A Legislative History, at 1679.

Throughout the legislative history, there is a clear tension between efforts to increase the Federal role and a desire to remain loyal to the principle of state implementation of the Act. During floor debate, Representative Jones (D-AL)[7] summarized this issue, stating:

> *All the weight of the evidence submitted to the committee during our extensive hearings confirmed our belief that an effective Federal-State partnership is absolutely indispensable to the*

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[7] Representative Robert "Bob" E. Jones, Jr. (D-AL) served in Congress from 1947 to 1977. Jones served in the House Committee of Public Works from his first term in office in 1946 and for 30 years was either an active member or chairman of each of its subcommittees. In 1972, he was a principal sponsor of the Federal Water Pollution Control Act of 1972. In 1975, he was elected to Chairmanship of the newly renamed Committee of Public Works and Transportation, with added jurisdiction over civil aviation and the regulatory agencies for air, highway, and water transportation. In recognition of his work on water quality issues, he was named vice chairman of the National Commission of Water Pollution, which produced the 1976 Report to Congress on the state of efforts to improve U.S. water resources.

> *success of this program . . . this legislation places the primary responsibility for administering the water pollution control program within the separate States, with the firm stipulation that each State must comply with the overriding Federal guidelines. . . .*

118 Cong. Rec. 8, 10207 (1972), *reprinted in* A Legislative History, at 358-359.

Amicus Senator Jeffords, as the former Chair and current Ranking Member of the Senate Environment and Public Works Committee (EPW), has a strong interest in ensuring that the intent of the Clean Water Act as reflected in the above quotations is upheld by the Supreme Court. Simply put, if the Petitioner's arguments are adopted by the Supreme Court, the Clean Water Act would be turned on its head. The Petitioner, through this appeal, seeks to rewrite Section 401 of the Act by altering the definition of discharge and by limiting the vital role of states in implementing the Act that my colleagues so articulately discussed above. Amicus Senator Jeffords submits this *amicus curiae* brief to provide assistance to the Supreme Court in understanding why supporting the Petitioner's claims runs counter to the legislative history of the Act, and to protect Congress's interest in ensuring that the goal of the Act – to restore the chemical, physical and biological integrity of our nation's waters – is achieved. 33 U.S.C. § 1251(a). All parties provided consent, including S.D. Warren Co., Maine Board of Environmental Protection, and American Rivers. Appendix 1.

SUMMARY OF ARGUMENT

I. The Petitioner's argument that Section 401 of the Act does not apply to hydroelectric dams because dams allegedly do not cause a discharge is contrary to the legislative history and the plain meaning of the Act. The meaning of the phrase "any discharge" as provided in Section 401 is distinguishable from the phrase "discharge of a pollutant" as provided in Section 402 of the Act. The Section 401 provision related to "any discharge" was intended by Congress to be broader and more inclusive than the Section 402 standard of a "discharge of a pollutant." Accordingly, the Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) that addressed the meaning of "discharge of pollutant" under Section 402 has no bearing on the application of Section 401 of the Act to hydroelectric facilities as the Petitioner argues.

II. The Petitioner seeks to rewrite Section 401 of the Act in a manner that would severely limit, if not remove completely, the authority of individual states to assure that federally licensed facilities comply with state water quality standards. Such an intrusion into the authority of states is in direct contravention of the intent and plain meaning of the Clean Water Act.

ARGUMENT

I. CONGRESS INTENDED THAT SECTION 401 OF THE ACT APPLY TO HYDROELECTRIC DAMS AND INTENTIONALLY CREATED A BROADER MORE INCLUSIVE DEFINITION OF DISCHARGE IN SECTION 401 THAN SECTION 402 OF THE ACT.

Sections 401 and 402 of the Act were clearly intended by Congress to serve different purposes. While Section 402 was intended to reduce pollution of the waters of the United States by establishing the National Pollution Discharge Elimination System (NPDES) permitting program for point sources that discharge pollutants, Section 401 was intended to address the impact that federally licensed facilities may have on water quality. To this end, Section 401 requires that certain facilities obtain state certifications assuring compliance with state water quality standards as a pre-requisite to obtaining a federal permit or license.

Congress expressed the distinction between Section 401 and 402 in the manner that the term discharge is used in each Section of the Act. Section 401(a)(1) of the Clean Water Act (Certification) states "[A]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in *any discharge* into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates ... that any such discharge will comply with the applicable provisions ... of this Act." 33 U.S.C. § 1341(a)(1) (emphasis added). In contrast, Section 402(a)(1) of the Clean Water Act states "[E]xcept as provided in Sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the

discharge of any pollutant, or combination of pollutants . . . upon condition that such discharge will meet . . . such conditions as the Administrator determines are necessary to carry out the provisions of this Act." 33 U.S.C. § 1342(a)(1) (emphasis added).

Congress used the terms "any discharge" in Section 401 of the Act to convey a different meaning than the term "discharge of any pollutant" in Section 402 of the Act. The rules of statutory interpretation hold that the use of two different terms in the same statute is presumed intentional. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).

A. The Legislative History of Sections 401 and 402 Indicate that the Terms "Discharge" and "Discharge of a Pollutant" Have Distinct Meanings.

Sections 401 and 402 of the Clean Water Act evolved from two separate and distinct pieces of legislation that were designed to address separate and distinct problems within the broader context of water pollution. Section 401's predecessor was Section 21(b) of the pre-1972 Amendments to the Federal Water Pollution Control Act, while Section 402 was an expansion and continuation of the permit program begun under the Refuse Act of 1899. H.R. Rep. No. 92-911, at 121 (1972), *reprinted in* A Legislative History of The Water Pollution Control Act Amendments of 1972, at 808; S. Rep. No. 92-1236, at 138 (1972), *reprinted in* A Legislative History, at 321.

The distinct purposes of these prior acts are reflected in the clearly and significantly different use and qualification of the term "discharge." In 1972 Section 21(b) read

"[A]ny applicant for a federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters shall provide the licensing or permitting agency a certification from the State . . . ", while the Refuse Act of 1899 prohibited the discharge of refuse into any navigable water without a permit H.R. Rep. No. 92-911, at 121 (1972), *reprinted in* A Legislative History, at 808; 33 U.S.C. § 407. It is clear from the language above that these statutes were designed to address separate means of discharging into the nation's waters.

Congress continued to distinguish between general discharges and discharges of refuse or pollutants when drafting Sections 401 and 402 of the Clean Water Act. Section 401 adopted the language of Section 21(b) verbatim (continuing to use "any discharge"), while the relevant part of Section 402 changed 'discharge of refuse' to the more modern "discharge of a pollutant." S. 2770, 92nd Cong. (1971), at 146, 152, *reprinted in* A Legislative History, at 1679, 1685. The use of these terms in these sections remained unchanged through both houses. See S. 2770, 92nd Cong. (1971), at 146, 152, *reprinted in* A Legislative History, at 1679, 1685; H.R. 11896, 92nd Cong. (1972), at 350, 356, *reprinted in* A Legislative History, at 1046, 1052. It is therefore clear that Congress intended "discharge" and "discharge of a pollutant" to remain distinct and separate terms when it replaced these prior acts with the more comprehensive Clean Water Act.

The following statement by Senator Muskie, the principal sponsor of the Senate version of the Water Quality Improvement Act which became the 1972 Federal Water Pollution Control Act, regarding Section 402 during the Senate Debate supports this conclusion:

This bill does not prohibit the discharge; it prohibits the discharge of any pollutant.

117 Cong. Rec. 30, 38839 (1971), *reprinted in* A Legislative History, at 1348. A closer look at the context of this statement makes it even more clear that Congress considered "discharge" and "discharge of a pollutant" to be distinct concepts. The discharge Senator Muskie referred to was the dumping of fish entrails into the ocean from a vessel, and the issue was whether a permit was necessary for this practice under Section 402. See A Legislative History, at 1346-1348. As Senator Muskie indicated, the answer depends on whether the entrails constitute a pollutant. *Id.* at 1348. If the debris associated with the cleaning of fish is considered a pollutant then the activity is a "discharge of a pollutant" and Section 402 applies. If not, then in Senator Muskie's own words, there is simply a "discharge" which Section 402 does not address. Clearly the term "discharge" was intended to have broader meaning than "discharge of pollutant."

B. Changes in the Definition of "Discharge" During Consideration of the Bill Prove that Congress Intended "Discharge" to Have a Broader Meaning than "Discharge of Pollutants."

The original Senate bill defined "discharge" as meaning "(1) any addition of any pollutant to navigable waters from any point source." S. 2770, 92nd Cong. (1971), *reprinted in* A Legislative History, at 1699. "Discharge of a pollutant" was not defined in the Senate bill. The later House version of the bill broadened the definition of "discharge" and added a definition of "discharge of a pollutant". Section 502(18) of the House bill stated, "The

term discharge when used without qualification includes a discharge of a pollutant, a discharge of pollutants, and a thermal discharge." H.R. 11896, 92nd Cong. (1971), *reprinted in* A Legislative History, at 1071. "Discharge of a pollutant" was defined as "any addition of any pollutant to navigable waters from any point source." See A Legislative History, at 1069-1070. Clearly the term "discharge" was intended to have broader meaning than "discharge of pollutant".

C. The Definitions of "Discharge" and "Discharge of a Pollutant" Were Not Amended Nor Were Amendments Proposed after Case Law Found them to Have Distinct Meanings.

In 1998 the Ninth Circuit Court of Appeals found that the definition of "discharge" was broader than "discharge of a pollutant" because "discharge" was defined as "including" "discharge of a pollutant." 33 U.S.C. § 1362(16); *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998), *cert. denied*, 528 U.S. 964 (1999). Essentially the court found that every "discharge of a pollutant" is a "discharge" but not every "discharge" is a "discharge of a pollutant." To date, Congress has not amended the Clean Water Act to reverse this Ninth Circuit decision with regard to hydroelectric dams.

D. Section 402 Addresses Discharges that Add Pollutants to the Nation's Waters and Section 401 Addresses Activities Harmful to Water Quality that Do Not Involve the Addition of Pollutants.

The rationale behind the distinctions in the definition of the term "discharge" in Sections 401 and 402 of the Act is that different types of activities have varying impacts on water quality. For example, facilities that add pollutants to the nation's waters through a pipe or conveyance are covered by Section 402 of the Act through the NPDES permit program. Section 401 is written more broadly than Section 402 in order to address water pollution that results not only from an addition of pollutants but also from "changes in movement, flow, or circulation of any navigable waters, . . . includes changes caused by the construction of dams." 33 U.S.C. § 1314(f)(F); See generally *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700 (1994) (Water flows released through a dam, which may not involve the addition of pollutants, are "discharges" subject to Section 401 certification). According to the U.S. Environmental Protection Agency, these impacts can be extremely serious and include chemical, physical and biological impacts such as low dissolved oxygen levels, turbidity, inundation of habitat, stream volumes and fluctuations, filling of habitat, impacts on fish migration, loss or degradation of wetlands, and loss of aquatic species as a result of habitat alterations.[8]

The legislative history of the Act demonstrates the intent of Congress to address the type of impacts associated

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[8] EPA website, http://www.epa.gov/owow/wetlands/facts/fact24.html.

with federally licensed facilities, such as hydroelectric dams. The House Report on the bill that led to Section 401 stated:

> *A wide variety of licenses and permits (construction operating and otherwise) are issued by various federal agencies. Many of them involve activities or operations potentially affecting water quality. The purpose of subsection 11(b) is to provide reasonable assurance (as determined by the affected State, States, or the Secretary of the Interior) that no license or permit will be issued by a federal agency for an activity that through inadequate planning or otherwise could in fact become a source of pollution.*

H.R. Rep. No. 91-127 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2691, RBA 6.

The House Report goes on to explain that Section 401 is intended to address the water quality impacts of all types of electric generating facilities:

> *The Chairman of the Joint Committee . . . was fearful that an undesirable competitive factor would be developed by virtue of the possibility that a significant fraction of all new electrical generating capacity (other than nuclear) would not be covered by subsection 11(b). The Committee believes that this concern is met by the fact that a federal license or permit of some kind is required for almost all electric generating plants, and a federal agency granting the relevant license can and should condition the grant upon compliance with applicable water quality standards.*

Id.

When Section 401's state certification was first enacted (as Section 21(b)), Senator Muskie, the primary sponsor of the Senate version of the Water Quality Improvement Act which became the 1972 Federal Water Pollution Control Act, called it "the most important section" of the Act.

He then said:

> *No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standards. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards.*

116 Cong. Rec. 7, 8984 (1970).

Likewise, Senator Cooper (R-KY),[9] described Section 401's predecessor as follows:

> *Indirectly, the Federal Government contributes to water pollution in its licensing activities over such things as nuclear power plants, hydroelectric power plants licensed by the Federal Power Commission [now FERC] and dredge and fill permits issued by the Army Corps of Engineers. S.7 will require, without exception, that all Federal activities that have any effect on water quality be conducted so that water quality standards will be maintained.*

115 Cong. Rec. 21, 28970 (1969).

---

[9] Senator Cooper (R-KY) served in the U.S. Senate from 1947 to 1973. In 1972, he was the Ranking Member of the Senate Public Works Committee.

Petitioner seeks to rewrite Section 401 of the Act by limiting its application to only discharges covered by Section 402. Such a rewrite of the Act would reverse the protections that Congress put in place when the Clean Water Act was adopted to address the impacts of facilities like hydroelectric dams. Congress put these protections in place by distinguishing between the definition of "discharge" in Sections 401 and 402 of the Act.

Only Congress can change the distinct meaning of Section 401 and Section 402.

II. THE INTENT OF THE CLEAN WATER ACT IS TO ENABLE STATES TO ASSURE COMPLIANCE WITH THEIR DULY ADOPTED WATER QUALITY STANDARDS.

One of the bedrock principles of the Clean Water Act is that it vests significant responsibility in each individual state to implement the Act and to take action to enforce state water quality standards. The Committee report accompanying S. 2770 states that:

> *For more than two decades, Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: the States shall lead the national effort to prevent, control, and abate water pollution.*

S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, RBA 2.

Throughout the legislative history, there is a clear tension between efforts to increase the Federal role and a desire to remain loyal to the principle that states should lead the effort to prevent, control, and abate water pollution.

During floor debate in the House on March 27, 1972, Representative Jones echoed this summary, stating:

> *All the weight of the evidence submitted to the committee during our extensive hearings confirmed our belief that an effective Federal-State partnership is absolutely indispensable to the success of this program . . . this legislation places the primary responsibility for administering the water pollution control program within the separate States, with the firm stipulation that each State must comply with the overriding Federal guidelines . . .*

118 Cong. Rec. 8, 10207 (1972), *reprinted in* A Legislative History, at 358-359.

The 1972 Clean Water Act consisted of three major parts – regulations on point sources of pollution designed to reach a goal of zero discharge, the authorization of federal financial assistance for wastewater treatment, and the establishment of water quality standards by the states. The states were provided the opportunity to obtain authority from the U.S. Environmental Protection Agency to operate their own Clean Water Act program, taking responsibility in most cases for the issuance of National Pollutant Discharge Elimination System (NPDES) permits. This approach has since been modeled in environmental statutes such as the Safe Drinking Water Act and the Clean Air Act.

Section 401 of the Clean Water Act, providing for state certification of Federal permits and licenses, embodies the intent of the Clean Water Act to delegate significant responsibilities to the states and rely on their expertise to implement clean water requirements. It is the primary

means by which states ensure that federally permitted activities comply with state-set water quality standards.

Congress clearly intended Section 401 to be a broad tool for use by the states, addressing all types of discharges into waters of the United States that occur within a state's boundaries. In the Committee report accompanying S. 2770, the Committee provides:

> *It should also be noted that the Committee continues the authority of the State or interstate agency to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State or jurisdiction of the interstate agency.*

S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, RBA 2.

The authority that the Committee report is referring to is found solely within Section 401 of the Clean Water Act. Petitioner's position, that Section 401 does not apply to federal licenses for hydroelectric dams, would strip the very authority and responsibility that the Committee report was highlighting as being vested in each individual state.

More fundamentally, the Petitioner's argument runs counter to the principle of state implementation of the Act cited above. Congress intended to continue to allow states to review the impact of certain federally licensed facilities for compliance with their water quality standards. If the Supreme Court were to deny states this right, vested in them by Congress, it would create an entire class of discharges that impact compliance with state water quality standards that states would have no independent authority to address. Specifically, it is conceivable that a

federally licensed facility could preclude a state from meeting its water quality standards if such facilities were exempt from Section 401. If Congress had intended such activities to be excluded from the determination as to whether water quality standards are met, Congress would have stated such an exclusion in the Act. No such exclusion appears in the Clean Water Act.

CONCLUSION

For the foregoing reasons, the judgment of the Maine Supreme Judicial Court should be affirmed.

Respectfully submitted,

JAMES M. JEFFORDS
United States Senator
State of Vermont

FOR ARGUMENT

No. 04-1527

(10)

Supreme Court, U.S.
FILED
JAN 6 - 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

S.D. WARREN COMPANY,
Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

On Writ of Certiorari to the Maine Supreme Judicial Court

BRIEF *AMICUS CURIAE* OF WATER QUALITY AND RIVERINE SCIENTISTS IN SUPPORT OF RESPONDENT MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION

RICHARD ROOS-COLLINS
Counsel of Record
NATURAL HERITAGE INSTITUTE
100 Pine Street, Suite 1550
San Francisco, CA 94111
(415) 693-3000

STEVEN P. MALLOCH
10212 Belgrove Court, N.W.
Seattle, WA 98177
(206) 818-0482

January 6, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. THE DISCHARGE OF "MERE FLOW" MAY HAVE SIGNIFICANT IMPACTS ON WATER QUALITY	5
A. Existing Hydropower Development of Nation's Waters	6
B. Design and Operation of Licensed Hydropower Projects	8
C. Water Quality Standards	11
D. Impacts of Hydropower Projects on Attainment of Water Quality Standards	12
1. Physical Integrity	13
2. Chemical Integrity	16
3. Biological Integrity	18
II. PETITIONER DISREGARDS THE PLAIN MEANING OF SECTION 401 BY SEEKING TO LIMIT IT TO A POINT SOURCE THAT DISCHARGES POLLUTANTS	22
III. PETITIONER'S THEORY LARGELY NULLIFIES SECTION 401 BY LIMITING IT TO THE DISCHARGE OF ANY POLLUTANT WHICH IS ALREADY REGULATED UNDER SECTION 402	23

TABLE OF CONTENTS—Continued

Page

IV. WARREN EFFECTIVELY SEEKS TO EXEMPT EXISTING HYDROPOWER PROJECTS FROM MANDATORY REGULATION UNDER THE CLEAN WATER ACT 24

V. PETITIONER'S THEORY WOULD DISRUPT A FUNCTIONING SYSTEM OF COOPERATIVE FEDERALISM IN THE REGULATION OF HYDROPOWER 24

CONCLUSION 30

APPENDIX A 1a

APPENDIX B 7a

APPENDIX C 48a

TABLE OF AUTHORITIES

FEDERAL CASES	Page
American Rivers, Inc. v. FERC, 129 F.3d 102 (2nd Cir. 1997)	2
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16 U.S.C. § 796(11)	8
16 U.S.C. § 797	7, 26, 28
16 U.S.C. § 802	8
16 U.S.C. § 803	7
16 U.S.C. § 803(a)	26, 28
16 U.S.C. § 803(j)	26, 28
16 U.S.C. § 807(a)	3

TABLE OF AUTHORITIES—Continued

	Page
16 U.S.C. § 808	3, 7
16 U.S.C. § 808(b)(1)	25
16 U.S.C. § 808(c)	26
16 U.S.C. § 811	26, 28
16 U.S.C. § 812	3
16 U.S.C. § 821	3
33 U.S.C. §§ 1251 *et seq.*	11
33 U.S.C. § 1251(a)	11
33 U.S.C. § 1251(a)(2)	11
33 U.S.C. § 1288	5, 6, 24
33 U.S.C. § 1311(a)	23
33 U.S.C. § 1312	22, 23
33 U.S.C. § 1313	11, 22
33 U.S.C. § 1313(c)	2
33 U.S.C. § 1313(c)(2)(A)	11
33 U.S.C. § 1313(d)	19
33 U.S.C. § 1313(d)(4)(B)	11
33 U.S.C. § 1314	5
33 U.S.C. § 1314(f)(2)	5, 24
33 U.S.C. § 1316	22, 23
33 U.S.C. § 1317	22, 23
33 U.S.C. § 1328	23
33 U.S.C. § 1341	2, 4
33 U.S.C. § 1341(a)(1)	*passim*
33 U.S.C. § 1341(d)	2
33 U.S.C. § 1342	5, 23, 27
33 U.S.C. § 1342(a)	22, 23
33 U.S.C. § 1344	23
33 U.S.C. § 1362(6)	11
33 U.S.C. § 1362(12)	5, 22
33 U.S.C. § 1362(14)	22
33 U.S.C. § 1362(16)	22
42 U.S.C. §§ 4321 *et seq.*	26

TABLE OF AUTHORITIES—Continued

FEDERAL REGULATIONS — Page

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18 C.F.R. § 4.60 7
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Page

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Page

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INTERESTS OF *AMICI CURIAE*

Amici curiae are scientists specializing in the scientific study and management of rivers and reservoirs. They have professional interests in assuring that federally licensed dams and other project works which generate electricity are designed, operated, and maintained in a manner that contributes to attainment of water quality standards for the affected navigable waters.[1] *Amici* respectfully submit this brief to aid in the Court's understanding of two topics: first, how such projects may adversely affect the physical, chemical, and biological integrity of waters protected by water quality standards; and second, how States use the unique authority granted by Clean Water Act section 401 to prevent or mitigate such adverse impacts, through mandatory conditions in the licenses which the Federal Energy Regulatory Commission issues for such hydropower projects under the Federal Power Act Part I. Counsel of record for all parties consented to the filing of this brief.[2]

SUMMARY OF ARGUMENT

Clean Water Act (CWA) section 401(a)(1), 33 U.S.C. § 1341(a)(1), applies to "any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters . . ." and which is subject to federal permit or licensing. By plain meaning, "any discharge" includes the mere discharge of water, and "facilities" include existing hydropower projects

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[1] The qualifications and positions held by *Amici* are set forth in Appendix A, which is bound with this brief. Individual *Amici* appear here in their individual capacities as scholars and scientists, not as representatives of any institutions with which they are affiliated. This brief has been financed by *Amici*, with support from the C.S. Mott Foundation. No counsel for any party authored this brief, in whole or in part. No party made a monetary contribution to the brief.

[2] Letters of consent have been filed with the Clerk.

licensed by the Federal Energy Regulatory Commission ("FERC").

Each hydropower project controls incoming flow of water and directs such flow through a powerhouse. It thus affects the physical volume and pattern of flow, both in the reservoir and downstream; the chemistry of such water; and the availability and suitability of habitat for aquatic life. Section 401(a)(1), 33 U.S.C. § 1341(a)(1), authorizes the State where the discharge occurs to certify that the discharge will comply with water quality standards which the State has adopted under Section 303(c), 33 U.S.C. § 1313(c), for the affected waters. Under Section 401(d), 33 U.S.C. § 1341(d), a certification sets forth conditions necessary to assure that the facility as a whole attains the water quality standards.[3] *See PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 711 (1994). Such conditions are incorporated into any license which FERC issues for a project under Federal Power Act Part I ("FPA"), 16 U.S.C. §§ 791 *et seq. Jefferson PUD*, 511 U.S. at 724; *American Rivers, Inc. v. FERC*, 129 F.3d 102 (2nd Cir. 1997).

The FPA otherwise preempts a State's authority to condition such a license.[4] *First Iowa Hydro-Electric Coopera-*

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[3] "Section 401(d) provides that any certification shall set forth 'any effluent limitations and other limitations . . . necessary to assure that *any applicant*' will comply with various provisions of the Act and appropriate state law requirements." *Jefferson PUD*, 511 U.S. at 711 (*quoting* 33 U.S.C. § 1341(d)) (emphasis added). Section 401(d) "author[izes] additional conditions and limitations on the activity as a whole once the threshold condition [stated in Section 401(a)], the existence of a discharge, is satisfied." *Id.* at 712. EPA's regulations implementing Section 401, 33 U.S.C. § 1341, expressly require a State to find that "there is reasonable assurance that the *activity* will be conducted in a manner which will not violate applicable water quality standards." *Id.* (*quoting* 40 C.F.R. § 121.2(a)(3)) (emphasis added).

[4] The FPA does not preempt a State's authority to: (A) issue and regulate water rights as necessary for project operation and to prevent injury to

tive v. Federal Power Commission, 328 U.S. 152, 181 (1946) ("The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls."); *California v. FERC*, 495 U.S. 490, 506 (1990). Section 401 is the States' only authority to assure that existing projects that discharge water flow (and not pollutants) will not cause violation of applicable water quality standards. Since 1970, States have conditioned licenses in this manner, thus assuring attainment of those standards consistent with continued electricity generation and other beneficial uses. *See, e.g., Pacific Gas and Electric Company*, 97 F.E.R.C. ¶ 61,031 (2001) (new license for P. No. 137 subject to 1976 certification). Since 1995, 28 States have certified the relicensing of 149 existing projects. *See* Appendix B.[5]

ARGUMENT

Petitioner S.D. Warren Company ("Warren") owns and operates hydropower projects on the Presumpscot River in Maine. Petitioner's Brief on Merits ("Pet. Br.") at 3. The original licenses for five of these projects expired on January 26, 2001. Warren filed timely applications with FERC for new licenses. *Id.* Warren requested certifications from the Maine Department of Environmental Protection ("Maine

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prior water rights (FPA section 27, 16 U.S.C. § 821); (B) regulate retail rates for electrical service (FPA section 19, 16 U.S.C. § 812); and (C) authorize a State or municipal agency to take over any licensed project, through a condemnation proceeding and on payment of fair market value (FPA section 14(a), 16 U.S.C. § 807(a)).

[5] *Amici* compiled this appendix through Westlaw to identify all licenses that FERC issued between November 30, 1995, and November 30, 2005. In this appendix, and consistent with FERC's terminology, "original" means the initial license for a project. "New" means a license issued pursuant to FPA section 15, 16 U.S.C. § 808, upon expiration of an original license. "Subsequent" means a license issued upon expiration of an original license in which FERC waived the applicability of FPA section 15, typically for a minor project. The difference between a new or subsequent license is immaterial to this case.

DEP") under protest. *Id.* at 9. On April 30, 2003, Maine DEP issued certifications which purport to regulate Warren's operations and recreational facilities. *Id.* at 4; Petitioner's Appendix ("Pet. App.") at A-74. On October 2, 2003, FERC issued new licenses which incorporate the certifications. *S.D. Warren*, 105 FERC ¶ 61,013 (2003). Warren now challenges the authority of Maine DEP to certify these projects under CWA section 401, 33 U.S.C. § 1341.

Warren interprets Section 401(a)(1), 33 U.S.C. § 1341(a)(1), to apply to an existing dam only if it adds pollutant from an outside source, such as grease or debris from a construction activity. Pet. Br. at 14-16. Under this interpretation, the section would not apply to Warren's or any other projects as a result of the discharge of "mere flow" of water for electricity generation. *Id.* at 15. Warren does not acknowledge the voluminous scientific record—developed by the U.S. Environmental Protection Agency ("EPA") since the early 1970s and submitted to Congress—which unequivocally shows that existing dams which discharge "mere flow" may impair the physical, chemical, and biological integrity of the waters which the Clean Water Act otherwise protects. *See* EPA, *Impact Of Hydrologic Modifications On Water Quality* (1975) [hereinafter *1975 Dam Report*]; EPA, *Dam Water Quality Study: Report To Congress* (1989) [hereinafter *1989 Dam Report*]; EPA, *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters* Ch. 6 (1993) [hereinafter *1993 Dam Report*]. [6] The fundamental question raised by this case is whether the Clean Water Act permits States to protect water quality, including designated beneficial uses of water supply as well as fish and wildlife, from the adverse impacts of "any discharge" by federally licensed hydropower projects.

These existing projects are not regulated under National Pollutant Discharge Elimination System ("NPDES") permits

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[6] *Amici* follow the naming convention of *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 163 n. 13 (D.C. Cir. 1983).

under Section 402, 33 U.S.C. § 1342. That section applies to point sources that discharge pollutants, as defined in Section 502(12), 33 U.S.C. § 1362(12). The parties agree that these projects, like many other existing hydropower projects, do not discharge pollutants and thus are not subject to permitting under Section 402 incident to relicensing. Section 304, 33 U.S.C. § 1314, and Section 208, 33 U.S.C. § 1288, which Warren cites as applying to existing dams (Pet. Br. at 24-25), also do not mandate permits or other limitations for dams such as Warren's that do not discharge pollutants.

On its face, Section 401 applies to any federally licensed activity that may discharge into navigable waters. By plain meaning, "any discharge" (33 U.S.C. § 1341(a)(1)) applies to the discharge of flow by an existing hydropower project. This is how the States, FERC, and EPA have interpreted the section. Between November 1995 and November 2005, States used this authority to certify 76% of the projects that FERC relicensed, while waiving certifications for the remainder. *See* Appendix B.[7] These certifications establish individualized conditions for these existing projects, as necessary to enhance baseline conditions permitted by the original licenses and otherwise attain all water quality standards in the affected waters.

I. THE DISCHARGE OF "MERE FLOW" MAY HAVE SIGNIFICANT IMPACTS ON WATER QUALITY.

Warren acknowledges that dams affect water quality. Pet. Br. at 23-24. It claims that Congress addressed impacts from dams as non-point sources via Clean Water Act section 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F), which requires EPA to develop information on procedures and methods to control non-point pollution, and Section 208, 33 U.S.C. § 1288,

[7] States have not denied certifications for any such projects during this period.

which requires areawide waste treatment plans in urban areas. *Id.* at 25. Petitioner does not identify any Clean Water Act authority, other than Section 401, whereby a State lawfully may establish operational limitations and other mandatory conditions in a federal license for an existing project that results in discharge of "mere flow" but not pollutants (Pet. Br. at 15) into navigable waters. It thus seeks to deregulate such discharges under the Clean Water Act, on the implicit theory that the statute establishes mandatory operational limitations only for point sources of pollutants. The record developed by EPA, as well as other aquatic, riparian, and wetlands scientists, shows that every hydropower project has the potential to affect attainment of applicable water quality standards. *Amici* discuss in order: the scope of existing hydropower development; the design and operation of such projects; water quality certifications; and the impacts of hydropower projects on water quality.

A. Existing Hydropower Development of Nation's Waters

FERC regulates all operating non-federal dams that generate electrical energy anywhere in the U.S.[8] Its jurisdiction extends to each hydropower project that meets at least one of the following tests: (1) occupancy of federal public land; (2) regulation of a navigable stream; (3) use of surplus water or water power from a federal dam; or (4) if the dam was constructed after August 26, 1935, any effect on interstate commerce, including linkage of the project to the grid. *See*

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[8] The U.S. Bureau of Reclamation, Army Corps of Engineers, Tennessee Valley Authority, and Bonneville Power Administration own and operate federal dams which are not subject to FERC's jurisdiction. These account for roughly 44% of the hydropower capacity in the nation; the balance belongs to licensed projects. *See* FERC, *Water Power—Present Development of Conventional Hydropower Projects, available at* www.ferc.gov/industries/hydropower/gen-info/water-power/wp-present-dev.asp (last updated May 31, 2005).

16 U.S.C. § 797. Its jurisdiction includes any project that, in addition to electrical generation, serves other functions such as water supply or flood control. Today, FERC regulates 1,016 projects[9] through licenses and 617 through exemptions.[10] The licensed projects are located in forty-five states, excluding only Delaware, Mississippi, North and South Dakota, and Hawaii.[11]

Each license has a term of 30 to 50 years. *See* 16 U.S.C. § 803; 18 C.F.R. § 5.18(b)(2). Before expiration, FERC determines whether to issue or deny a new license. *See* 16 U.S.C. § 808. FERC issued 239 new or subsequent licenses between November 1995 and November 2005. *See* Appendix B. More than 125 licenses will expire over the next decade, making those projects subject to relicensing and water quality certification. *See* Appendix C;[12] *see also* 18 C.F.R. §§ 4.34(b)(5)(i), 5.23(b).

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[9] A project may include more than one dam. For instance, Alabama Power Company's Coosa River Project currently includes five individual dams. *See* Alabama Power Company, *Application for New License (P. No. 2146)* A-1 (2005), *available at* http://www.ferc.gov/docs-filing/elibrary.asp (eLibrary no. 2005728-4003). Thus, the number of *dams* under FERC's licenses substantially exceeds 1,016.

[10] An exemption is a short form of license. It applies only to small projects with capacity of five megawatts or less. 18 C.F.R. § 4.60. Unlike a license, it has a perpetual term. This brief focuses on licenses, since an exempt project is not subject to a relicensing proceeding.

[11] *See* FERC, *Hydroelectric Projects under Commission License* (2005), *available at* www.ferc.gov/industries/hydropower/gen-info/licenses.xls; FERC, *Outstanding Exemptions as of 07/08/05*, *available at* http://www.ferc.gov/industries/hydropower/gen-info/exemptions.xls.

[12] *Amici* compiled this appendix from FERC's spreadsheet, *Hydroelectric Projects under Commission License*, *supra*. The search logic identified all projects whose licenses expire between January 1, 2006, and January 1, 2016.

B. Design and Operation of Licensed Hydropower Projects

The projects at issue are 5 out of 1,016 existing projects licensed by FERC. Their fundamental design and operation are common, although the details (including scale) vary significantly from project to project.

A hydropower project converts the energy of flowing water into electricity. It consists of several common elements. A *dam*, weir, or other facility diverts water from its natural course in a river. The dam stores water in a *reservoir* or pond. A *spillway* conveys flow over or through the dam during periods of non-generation, or when the incoming flow exceeds the combined generation capacity of the powerhouse and available storage capacity of the reservoir. An *intake* uses gravity to deliver the diverted water from the reservoir to a powerhouse. It may be located at the reservoir surface or underwater. A *powerhouse*, which may be located in the dam itself or downstream, consists of at least one turbine that converts the kinetic energy of falling water into mechanical energy. The spinning turbine drives a generator, which converts mechanical energy to electricity. A *bypass reach* is any length of river between the dam and a powerhouse. A *tailrace* conveys discharged flow from a powerhouse back to the river channel. A *transmission line* transports the electricity from the powerhouse to the grid or other point of use. *See* J. Gulliver & R.E.A. Arndt, *Hydropower Engineering Handbook* 1.12-1.14 (1991). A license covers a "complete unit of development," 16 U.S.C. § 796(11), which consists of those facilities and property rights in lands and waters necessary for construction, operation, and maintenance of the project, 16 U.S.C. § 802.

Because electricity cannot be stored in any conventional manner, a hydropower project—like any generation source—operates to supply grid demand on an instantaneous basis.

The licensee regulates the diversion of water from the dam to the powerhouse on that same basis.

> [T]he two basic functions of dams are to store water and raise water levels. The storage ability of dams allows runoff to be retained for subsequent controlled release, whereas the ability to raise upstream water levels . . . increases hydraulic head for hydropower generation . . . . The most common classification of operational characteristics divides dams into two groups, storage and run-of-river, based in large part on these functional differences.

N.L. Poff and D.D. Hart, *How Dams Vary and Why It Matters for the Emerging Science of Dam Removal*, 52 BioScience 659, 661-2 (2002).

A *run-of-river* project may modify flow pattern on a short-term (for example, hourly or daily) basis—but not over a longer term, due to limited physical storage capacity or operating rules that preclude storage. *See* H. Rochester et al., *Physical Impacts of Small-Scale Hydroelectric Facilities and Their Effects on Fish and Wildlife* 141 (1984) (U.S. Fish and Wildlife Service FWS/OBS-84/19); EPA, *1993 Dam Report*, *supra*, Ch. 6. Warren's dams range from 14 to 50 feet in height, store variously from 8 to 197 acre-feet[13] of water, and operate in this manner.[14] *See* Pet. App. at A-75-77.

A *storage* project allows the powerhouse to draft from its reservoir upon demand rather than rely on incoming flow. It typically stores flood or other high flows for use in drier periods, or at night for use during the day. The effect of a storage project is to "suppress the natural extremes of spate

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[13] An acre-foot is the volume of water (325,851 gallons) which covers an acre to one foot of depth.

[14] Warren's licenses allow impoundment levels to vary within one foot of full pond under normal operating conditions. *See* Pet. App. A-78. Warren has exclusive control over such variation.

and drought and make the *annual* flow patterns more uniform. Short-term fluctuations may, however be quite violent . . . ." T. E. Langford, *Electricity Generation and the Ecology of Natural Waters* 26 (1983); U.S. Army Corps of Engineers, *Hydropower: Value To The Nation* 5 (2001) *available at* http://www.corpsresults.us/pdfs/Hydropower.pdf [hereinafter *Hydropower Value*]. Because water supply is limited, such a project typically operates during periods of peak electricity demand, such as summer afternoons for air conditioning, or when project power is otherwise cheaper to dispatch than the next available generation source. Most licensed projects use storage in this manner. *See* EPA, *1993 Dam Report*, *supra*; Army Corps, *Hydropower Value*, *supra*, at 5.

Licensed hydropower projects differ in design and operation. Variables such as flow pattern, weather, topography, electricity demand, and even marketing strategy cause these differences. For example, the generation capacities at licensed projects vary by more than six orders of magnitude: the smallest is 1 kilowatt ("KW") at Spring Creek Project in Washington State, while the largest is 2,515.5 megawatts ("MW") at the Niagara Falls Project. *See* FERC, *Hydroelectric Projects under Commission License*, *supra*. Dam heights range from a few feet to 750 feet at the Oroville Project in California's Central Valley. *See* California Department of Water Resources, *Application for New License (P. No. 2100)* (2005) (eLibrary no. 2005128-0067) [hereinafter, *P. No. 2100 License Application*]. Bypass reaches range from a few hundred feet to more 20 miles at the Coosa River Project in Alabama. *See* Alabama Power Co., *Application for New License (P. No. 2146)* A-2 (2005) (eLibrary no. 2005728-4003) [hereinafter, *P. No. 2146 License Application*]. Reservoir sizes range from under 50 acre-feet to more than 2 million acre-feet at the Oroville Project. *See P. No. 2100 License Application*, *supra*. Powerhouse discharges

range from a few cubic feet per second ("c.f.s.") to more than 115,000 c.f.s. at the Niagara Falls Project. *See, e.g.*, New York Power Authority, *Application for New License (P-2216)* A-15 (2005) (eLibrary no. 20050819-0070).

C. Water Quality Standards

Warren seeks to limit the application of Section 401 to a point source which discharges a pollutant, defined to mean "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." CWA section 502(6), 33 U.S.C. § 1362(6). *See* Pet. Br. at 15. Leaving aside the merits of its interpretation of Section 401, the purpose and scope of water quality standards under the Clean Water Act are plainly broader than such pollutant discharges.

The objective of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.*, § 1251(a). The goal is to achieve, "whenever attainable," "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." *Id.* § 1251(a)(2). Pursuant to Section 303, 33 U.S.C. § 1313, each State adopts and implements water quality standards applicable to navigable waters within its borders, subject to EPA's oversight and approval. Such standards consist of designated beneficial uses, narrative and numeric criteria (such as a dissolved oxygen level), and an anti-degradation policy. 33 U.S.C. §§ 1313(c)(2)(A), 1313(d)(4)(B); 40 C.F.R. § 131.12. "Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." 33 U.S.C. § 1313(c)(2)(A). Such stan-

dards "play a central role in a State's water quality management program, which identifies the overall mechanism States use to integrate the various Clean Water Act quality control requirements into a coherent management framework." EPA, *Water Quality Standards Handbook: Second Edition* Int-13 (1994).

Maine has adopted water quality standards for rivers, with additional sub-classifications according to: geography; lakes and ponds; marine and estuarine waters; and groundwater. Me. Rev. Stat. Ann. tit. 38 §§ 464—470; Pet. App. at A-83—A-87. Designated beneficial uses for the affected reaches of the Presumpscot River include drinking water after disinfection, recreation in and on the water, fishing, industrial process and cooling water supply, hydroelectric power generation, navigation, and habitat for fish and other aquatic species. *See* Pet. App. at A-84.

D. Impacts of Hydropower Projects on Attainment of Water Quality Standards

Maine DEP found, and Warren did not dispute, that Warren's projects have affected attainment of these water quality standards on the Presumpscot. Each dam diverts most available flow out of the river channel between the dam and powerhouse. Under the original licenses, these bypass reaches, which range from 300 to 1,075 feet in length (*see* Pet. App. at A-94), were dry whenever the dams did not spill or leak water (*see id.* at A-78). The absence of water flow in these bypass reaches impaired habitat for fish and other aquatic species, one of the river's designated beneficial uses. *See id.* at A-89. Discharges from certain powerhouses in summer months caused exceedances of the dissolved oxygen criteria. *See id.* at A-111—A-112. The projects (as well as other facilities) blocked upstream passage of Atlantic salmon, American shad, alewife, and other anadromous fish. *Id.* at A-89. These impacts on Maine's water quality were the basis for the certifications at issue.

The impacts of Warren's projects on the physical, chemical, and biological integrity of the Presumpscot River fall within the wide range caused by the 1,106 licensed projects potentially affected by this case. The impacts of a given project are a function of the setting, design, the plan of operation including period of storage, the volume of discharge, as well as other variables. *See* EPA, *1975 Dam Report*, *supra*, at 40-41; *1989 Dam Report*, *supra*, at viii; N.L. Poff, *How Dams Vary*, *supra*, at 660. Any impact may cause compound or secondary effects. EPA, *1975 Dam Report*, *supra*, at 10-11; *1989 Dam Report*, *supra*, at iii-ix; *1993 Dam Report*, *supra*, Ch. 6. For example, storage, which reduces flow, may alter the downstream water temperature, reduce dissolved oxygen levels, diminish sediment load, or increase dissolved nutrients and toxic chemicals. Rochester et al., *Physical Impacts of Small-Scale Hydroelectricity*, *supra*, at 61-62.

Amici now address how hydropower projects may affect the physical, chemical, and biological integrity of waters. As directed in Section 101(a), the Clean Water Act seeks to protect such integrity, which is a "condition in which the natural structure and function of ecosystems [are] maintained." *Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273, 1294 (1st Cir. 1996). *Amici* underscore that, while such impacts may be beneficial or adverse, EPA, *1989 Dam Report*, *supra*, at iii, this brief highlights the adverse impacts which are the focus of any certification under Section 401.

1. *Physical Integrity*

A hydropower project, which controls flow to generate electricity, affects the physical integrity[15] of the occupied river as a result. Gulliver & Arndt, *Hydropower Engineering*

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[15] *Physical integrity* is the dynamic equilibrium of the flow pattern and landscape (channel, beaches, bars, and flood plain) of a river. W.L. Graf, *Damage Control: Dams and the Physical Integrity of America's Rivers*, 91 *Annals of the Association of American Geographers* 1, at 6 (2001).

Handbook, *supra*, at 1.10. Every dam or diversion reduces the velocity of flow in the upstream river. In turn, the discharge from the powerhouse typically changes the volume and velocity of flow downstream. Every diversion which routes water to a remote powerhouse, including each of Warren's dams, reduces the flow in the bypass reach to spill, leakage, or any minimum flow discharge required by the applicable license. The original licenses for Warren's projects, like many outstanding licenses elsewhere, do not require discharges into the bypass reaches, which often dry up as a result. In sum, a dam changes the "hydraulics of a stream . . . and may upset the natural hydrologic equilibria . . . ." EPA, *1975 Dam Report*, *supra*, at 40.

Water flows in a river in a pattern (also called flow regime) consisting of volume, frequency, and duration.[16] The flow pattern varies by day, season (such as spring snowmelt), and year (such as flood or drought). Low and high volumes—and when and how frequently they occur—directly affect the entire ecosystem, including fish, wildlife, and plant species. The flow pattern is a "master variable" that drives other physical, chemical, and biological resources. B.F. Richter et al., *Ecologically Sustainable Water Management: Managing River Flows for Ecological Integrity*, 13 *Ecological Applications* 206, 207 (2003).

Storage by a hydropower project alters the natural variability of flow in order to attain controlled generation, water supply, and other developmental benefits. Storage allows the discharge of a higher flow during a dry period, or a lower flow when a river would naturally be full, shifting flow in time and magnitude. This alters the natural pattern of wet and dry periods to which aquatic and riparian species are adapted. *See* Richter et al., *Ecologically Sustainable Water Manage-*

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[16] Hydrographs, which are plots of discharge versus time, describe these patterns.

ment, *supra*, at 207. Natural variability may be altogether eliminated in a bypass reach that is dependent on occasional spill, leakage, or a uniform minimum flow discharge. Conversely, the powerhouse discharge may exceed natural variability by causing large and frequent fluctuations in flow. For example, under its new license, the Roanoke River Project in North Carolina discharges a minimum flow of 1,500 c.f.s. to 2,800 c.f.s., depending on the season, for the protection of the downstream aquatic resources; while the powerhouse may discharge 0 c.f.s. up to 19,000 c.f.s. Thus, the regulated flow (inclusive of minimum flow and powerhouse discharges) ranges from 1,500 c.f.s. to more than 20,000 c.f.s. in any given day during non-flood season. By contrast, the intra-day variability of historical flows rarely exceeded 5,000 c.f.s. during that season. While many species are accustomed to periodic floods and droughts, such variation within the span of a single day may be beyond the capacity of some to adapt. *See* S.H. Pearsall et al., *Adaptive Management of Flows in the Lower Roanoke River*, 35 *Environmental Management* 353 (2005).

The discharge directly controls the depth, width, and velocity of water at any given point in a channel. *See* B.F. Richter, *A Spatial Assessment of Hydrologic Alteration within a River* Network (1998), available at http://www.freshwaters.org/pub/pdf/hydroalt.pdf; U.S. Geological Survey, *Historical Backdrop to IFIM* (2003), *available at* http://www.fort.usgs.gov/products/software/ifim/history.asp. These variables in turn control the availability of habitat for any aquatic resource at a given time.[17] *Id.*

In addition to the flow of water, a hydropower project also affects the flow of sediment, including sand and gravel, in a

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[17] Licensees use IFIM and similar scientific methods in relicensing proceedings to predict how incremental changes in the regulated flow discharge will affect the availability of habitat for a specific species of fish.

river. Moving water carries sediment. Upon entering a reservoir, flow loses velocity, and sediment tends to drop to the reservoir bottom. D.L. Vicher & W.H. Hager, *Dam Hydraulics* 235-252 (1998); *see* EPA, *1989 Dam Report*, *supra*, at II-7. Glen Canyon Dam, which traps an estimated 44 million *tons* per year of sediment in Lake Powell, is a dramatic example of this process. *See* E.D. Andrews, *Sediment Transport in the Colorado River Basin, in Colorado River Ecology and Dam Management*, at 68 (1991). Water discharged from the tailrace again has energy needed to transport sediment, but the natural load remains trapped in the reservoir. D.B. Simons & F. Senturk, *Sediment Transport Technology: Water and Sediment Dynamics* 775-803 (1992). It becomes "hungry water," scouring the riverbed below for sediment. G.M. Kondolf, *Hungry Water: Effects of Dams and Gravel Mining on River Channels, in* 21 *Environmental Management*, at 533-551 (1997). In some circumstances, the "hungry water" may strip fine sediment and gravel and erode beaches and bars for hundreds of kilometers downstream of the powerhouse, and in the process leave only very coarse cobbles and boulders armoring the channel bottom. G.P. Williams & M.G. Wolman, U.S. Geological Survey Professional Paper 1286, *Downstream Effects of Dams on Alluvial Rivers* 60 (1984); F. Senturk, *Hydraulics of Dams and Reservoirs* 641-667 (1994).

2. *Chemical Integrity*

A hydropower project affects the chemical integrity of the water through four main processes: thermal stratification, eutrophication, gas supersaturation, and discharge volume.

Thermal stratification occurs in a reservoir when water warmed by solar radiation and exposure to air floats on top of cold, denser water. This process—familiar to summertime swimmers—occurs as a function of seasonal warming, depth

of reservoir, and length of storage time.[18] EPA, *1989 Dam Report, supra*, at II-2; *1993 Dam Report, supra*, Ch. 6. Stratification occurs in at least 40% of the large reservoirs surveyed by EPA. EPA, *1989 Dam Report, supra*, at iv. Thermal stratification has many secondary effects. In the deep, cold layer (hypolimnion) these include: reduction in the dissolved oxygen level as a result of organic matter decomposition; increased nutrient concentrations (both phosphorus and nitrogen); increased dissolved metals; and production of toxic hydrogen sulfide. *Id.* The downstream impacts of discharges from a stratified reservoir depend on where the intake is located. For instance, a deep intake will likely release cold water which is low in dissolved oxygen and elevated in dissolved nutrients and metals. Discharges from up to 50% of large hydropower reservoirs reduce dissolved oxygen in downstream receiving waters. *Id.* at v.

Eutrophication occurs when nutrients from upstream lands or activities, such as agriculture, are added to a reservoir. Sunlight, increased surface area, and slow water movement then stimulate growth of aquatic plants. This process results in the growth of algae (potentially including toxic forms and those which affect odor and taste of water), depletion of dissolved oxygen in deeper parts of the reservoir, and increased concentrations of dissolved iron, manganese, and hydrogen sulfide. EPA, *1989 Dam Report, supra*, at iii-iv, ix, II-5—II-6; EPA, *1993 Dam Report, supra*, Ch. 6. As a result of algae blooms and other secondary effects, eutrophication degrades the suitability of water for the designated uses of drinking supply, recreation, and fish and wildlife habitat. Eutrophication occurs in 78% of large hydropower reservoirs. EPA, *1989 Dam Report, supra*, at v.

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[18] A USGS animation graphically depicts density stratification in Lake Powell on the Colorado River. U.S. Geological Survey, *Lake Powell Animation: 1965 to 2001, available at* http://www.gcmrc.gov/products/water_quality/lp_animation/lp_animation.htm.

Gas supersaturation occurs when air is entrained into water by structural design of the intake, or when the flow is discharged over a spillway into a deep plunge pool. While entrained oxygen may have a beneficial effect, nitrogen is not biologically reactive and may cause gas bubbles (similar to divers' bends) to form in the tissue of vertebrates, including fish, downstream of the discharge. EPA, *1989 Dam Report, supra*, at II-6; D.E. Weitkamp & M. Katz, *A Review of Dissolved-gas Supersaturation Literature, in* 109 *Transactions of the American Fisheries Society*, at 659-702 (1980).

Discharge volume affects the chemistry of receiving waters, as well. Discharge that is reduced relative to the natural hydrograph may result in elevated water temperature downstream during summer months, since temperature is a function of flow volume as well as ambient air temperature. EPA, *1989 Dam Report, supra*, at II-7—II-8. It may also reduce the capacity of the river to assimilate and dilute downstream discharges of pollutants from other sources. High discharge may increase channel scour and bank erosion. *Id.*

3. *Biological Integrity*

Hydropower projects may impair the biological integrity of the rivers they occupy. Along with non-point pollution and invasive species, dams are a main cause for the substantial decline in aquatic, riparian, and wetlands biodiversity. *See* B.F. Richter et al., *Ecologically Sustainable Water Management, supra*, at 206. Today, more than 50% of freshwater mussels are at risk of extinction, as are more than 40% of freshwater fishes and amphibians. *See* The Nature Conservancy, *Precious Heritage: The Status of Biodiversity in the United States* (2005), *available at* http://nature.org/initiatives/freshwater/about/.

Flow alteration by dams is a substantial cause of this decline in species populations. Many aquatic and riparian species have habitat requirements that vary seasonally, and their life histories (for example, reproduction and rearing) are

linked to specific flow patterns to which they have adapted over time. N.L. Poff et al., *The Natural Flow Regime*, 47 *BioScience* 769 (1997). For instance, higher flows during spawning season may cue upstream migration of anadromous fish and also, as they recede, create riparian wetlands suitable for amphibians. *Id.* Pursuant to CWA section 303(d), 33 U.S.C. § 1313(d), EPA instructs the States to consider flow, water depth, and velocity to attain designated beneficial uses such as propagation and protection of aquatic species. EPA, *Water Quality Handbook*, *supra*, at 2-10—2-11. Alteration of flow variability to meet electricity demand even in the absence of associated change in the water chemistry—may reduce availability of suitable habitat and thus impair distribution and population of aquatic species. M.B. Bain et al., *Streamflow Regulation and Fish Community Structure, in* 69 *Ecology*, at 382-392 (1998).

Hydropower projects affect biological integrity through alteration of other physical or chemical conditions of waters. For instance, decreased dissolved oxygen or altered water temperature may exceed the physiological tolerances of native species.[19] A reservoir turns riverine habitat into lake habitat suitable for native or exotic fish adapted to still or warm water. Discharge of cold and nutrient rich water from the hypolimnion of a reservoir may convert downstream warm-water fish habitat into cold-water.[20] For example, the discharge of cold water from the hypolimnion of large dams is a significant contributing factor to the threatened and endangered status of several Colorado River Basin fish listed under the federal Endangered Species Act, because cold water

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[19] Temperature and dissolved oxygen are inversely related: warm water is capable of holding less dissolved oxygen than cold water. Fish, such as trout and salmon, adapted to cold oxygenated water cannot survive in warm water with its lower maximum oxygen levels.

[20] Trout anglers are familiar with very productive tailwater fisheries below large dams.

impairs fish reproduction and rearing. R. Abell, *San Juan River Basin Water Quality and Contaminants Review* 78-79 (1994), *available at* http://www.fws.gov/southwest/sjrip/Documents/DocumentsandReports/waterqualityreviewvol1.pdf. Or discharge of warmed water may adversely affect cold-water fish downstream. Warm-water discharges, following seasonal depletion of available cold water in reservoirs, are a contributing factor to the endangered status of the winter-run Chinook salmon in California's Sacramento Valley. National Marine Fisheries Service, *Status of Sacramento River Winter-run Chinook Salmon*, 59 Fed. Reg. 440 (Jan. 4, 1994); D.K. Nickel *et al.*, *Factors Regulating Shasta Lake (California) Cold Water Accumulation, A Resource For Endangered Salmon Conservation*, 40 *Water Resources Research* W05204 (2004). Impacts of a given project depend on the timing, volume, and chemistry of discharges relative to critical life stages of the specific fish and invertebrate species in the affected waters.

Alteration in sediment transport, and specifically "hungry water" downstream of a hydropower project, may eliminate spawning gravels or erode beach and bar habitat needed for fish spawning and rearing. M. Collier et al., U.S. Geological Survey Circular 1126, *Dams and Rivers: Primer on the Downstream Effects of Dams* (1996). Altered flows of water and sediment also reduce floodplains and shrink channels downstream from dams, resulting in significant impacts on fish and birds that rely on the wetlands and other areas at the margin of channel. P.J. Murphy et al., U.S. Bureau of Reclamation, *The Platte River Channel: History and Restoration* (2005). As shown on the Columbia River, "hungry water" may also reduce cover for fish that depend on turbidity for protection from predators. J.G. Williams et al., *Effects of the Federal Columbia River Power System on Salmonid Populations* (2005).

Hydropower projects may block passage for fish and other aquatic species seeking to migrate to spawn or feed.[21] Warren's projects, along with other downstream facilities on the Presumpscot River, block upstream passage of anadromous fish (Atlantic salmon, American shad, alewife, and blue-black herring) to historic spawning habitat. *See* Pet. App. at A-89. In California, dams at the rim of the Central Valley block 70% of the historic spawning habitat for salmon, steelhead, and other anadromous fish in the Sierra mountains. *See* University of California, *Sierra Nevada Ecosystem Project Report* 125 (1996). Even a small dam of less than one meter in height may block passage for fish with limited leaping capacity and reduce the number of species living in a river. *See* V.J. Santucci et al., *Effects of Multiple Low-Head Dams on Fish, Macroinvertebrates, Habitat and Water Quality in the Fox River, Illinois*, 25 *North American Journal of Fisheries Management*, at 975-992 (2005). A dam of any height blocks the movement of mussels and may block movement of fish upon which some mussels depend for transport during part of their life cycle. *See* G.T. Watters, *Small Dams As Barriers To Freshwater Mussels And Their Hosts*, 75 *Biological Conservation*, at 79-85 (1996). For example, licensed projects are a leading cause for extinction of mussels and snails in the Coosa River tributary to Mobile Bay in Alabama. *See* U.S. Fish & Wildlife Service, *Comments on License Application for P. No. 2146* (2005) (eLibrary no. 20050311-0135). Fish moving downstream, often juveniles for anadromous fish, may also be entrained when they are sucked into the turbines, resulting in injury or death. FERC, *Evaluation of Mitigation Effectiveness at Hydropower Projects: Fish Passage* (2004).

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[21] This impact on fish migration has been recognized for more than a century. Since the 1870s, dams in England, Scotland, and Wales have been built with fish passages to protect salmon and trout populations. Gulliver & Arndt, *Hydropower Engineering Handbook*, *supra*, at 8.2.

II. PETITIONER DISREGARDS THE PLAIN MEANING OF SECTION 401 BY SEEKING TO LIMIT IT TO A POINT SOURCE THAT DISCHARGES POLLUTANTS.

Section 401(a)(1) of the Clean Water Act provides:

> Any applicant for a Federal license or permit to conduct *any activity* including, but not limited to, the construction or operation of facilities, which may result in *any discharge* into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that *any such discharge* will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C. § 1341(a)(1) (emphasis added). Warren argues that "any discharge" means "any discharge of pollutant from a point source" (Pet. Br. at 16), relying on inferences from Section 502(16), 33 U.S.C. § 1362(16),which defines discharge; Section 502(12), 33 U.S.C. § 1362(12), which defines "discharge of pollutant"; Section 502(14), 33 U.S.C. § 1362(14), which defines "point sources"; Section 402(a), 33 U.S.C. § 1342(a), which refers to "discharge of any pollutant"; and the structure of the statute and the legislative history of the 1970, 1972, and 1977 Clean Water Act amendments. *Amici* will leave the parsing of these complex arguments to Respondent and others. Warren's inferences *do* have a fatal flaw. Section 401, 33 U.S.C. § 1341(a)(1), reads: "any discharge," not "any discharge of a pollutant." It says: "any facility," inclusive of point and other sources of discharge, not "any point source." Plain meaning is just that, not a daisy-chain of inferences.

According to plain meaning, each licensee for an existing project must apply to the appropriate State for certification as a condition of relicensing. EPA interprets Section 401 to apply to such projects, without distinction as to whether they are existing or as yet unbuilt. *See* EPA, *Water Quality Handbook*, *supra*, at 7-10.

III. PETITIONER'S THEORY LARGELY NULLIFIES SECTION 401, BY LIMITING IT TO THE DISCHARGE OF ANY POLLUTANT WHICH IS ALREADY REGULATED UNDER SECTION 402.

Warren argues that Section 401 applies only to a discharge of pollutants from a point source. Pet. Br. at 15. If that is so, Section 401 applies only to a discharge already regulated by an NPDES permit under Section 402.

Section 301(a) prohibits the discharge of pollutants except as permitted by Section 302 (effluent limitations), 306 (national standards of performance), 307 (toxic and pre-treatment standards), 318 (aquaculture), 402 (NPDES permits), and 404 (dredge-and-fill permits), which all concern point sources. 33 U.S.C. §§ 1311(a), 1312, 1316, 1317, 1328, 1342, 1344. Section 402(a)(1), 33 U.S.C. § 1342(a)(1), is the primary permitting authority for a discharge of pollutants from a point source. If Section 401 applies only to the discharge of pollutants from a point source, then it duplicates Section 402(a)(2), which applies to any federally licensed or other point source. This theory effectively nullifies the independent effect of Section 401. Further, Warren cannot explain why Section 301(a)—which prohibits the discharge of a pollutant from a point source except as permitted in Sections 302, 306, 307, 328, 402, and 404—omits Section 401, if indeed Section 401 only applies to such discharge.

IV. WARREN EFFECTIVELY SEEKS TO EXEMPT EXISTING HYDROPOWER PROJECTS FROM MANDATORY REGULATION UNDER THE CLEAN WATER ACT.

Section 402 applies to a point source that discharges pollutants from the outside world. It does not apply to an existing hydropower project which does not discharge pollutants. If, as Warren argues, Section 401 applies conterminously, then existing licensed projects that do not discharge pollutants are not subject to regulation under either Section 401 or 402, regardless of their impacts on the physical, chemical, and biological integrity of a river.

Warren relegates the discharge of "mere flow" (Pet. Br. at 15) to Section 304(f)(2)(F). *See* Pet Br. at 25. But Section 304(f)(2)(F) only requires EPA to develop "information" on the nature and extent of nonpoint sources of pollution and methods and processes for control. 33 U.S.C. § 1314(f)(2).

By reference to *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 174-5 (D.C. Cir. 1983) (cited in Pet. Br. at 18, 23, 25), Warren also invokes Section 208, which provides for the adoption of areawide waste treatment plans for areas with "urban-industrial concentrations . . . ." 33 U.S.C. § 1288(a). As provided in Section 208(b)(2)(C), 33. U.S.C. § 1288(b)(2)(C), such plans do not expressly address the discharge of flow from any facility, and they may not even apply to hydropower projects located in rural areas. Warren argues that licensed projects which discharge flow but not pollutants would be exempt from mandatory regulation under the Clean Water Act.

V. PETITIONER'S THEORY DISRUPTS A FUNCTIONING SYSTEM OF COOPERATIVE FEDERALISM IN THE REGULATION OF HYDROPOWER.

Section 401, as federal law, is the States' only non-preempted authority to assure that existing hydropower projects

that merely discharge flow attain water quality standards. Warren seeks to strip the States of this authority, on the basis of its non-plain reading of Section 401 and the fear that States will disregard the electricity generation benefits of such projects. *See* Pet. Br. at 15-16. Warren's theory would disrupt a system of cooperative federalism which functions effectively today to assure that electricity generation, water supply, flood control, and other developmental benefits are achieved in a manner that also protects water quality and other non-developmental uses. This system consists of scientific study, settlement, and other forms of cooperation in the development of conditions under the CWA and FPA.

A scientific record is cooperatively developed in each relicensing proceeding as the basis for the new or subsequent license. Not less than five years before expiration of the current license, the licensee must provide public notice of its intent to seek a new license. 16 U.S.C. § 808(b)(1). In consultation with FERC, other agencies, and stakeholders, it develops and implements a plan of study of the affected waters and lands.[22] Under the Integrated Licensing Process adopted in 2003, 16 C.F.R. Part 5, FERC and other agencies cooperate to identify what information they need in the record for their respective decisions. Under State law implementing Section 401(a)(1),[23] the State may compel the licensee to correct

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[22] Among other things, the study assesses the current operations of the project, baseline conditions of each natural resource affected by the project, and the potential impacts of alternative operations (such as an increase in minimum flow discharge) and other mitigation measures. FERC, *Handbook for Hydroelectric Project Licensing and 5MW Exemptions From Licensing* 2-7 – 2-10 (2004).

[23] As provided in Section 401(a)(1), each "[s]uch State . . . shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications." 33 U.S.C. §1341(a)(1). For example, a State may adopt implementing procedures which permit

deficiencies in the record as necessary for its certification decision on the new license application.[24] FERC, the State, and other agencies also cooperate to develop the environmental documentation required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, and State law applicable to the certification decision.[25] They further coordinate the development and public comment on draft conditions under their respective authorities. *See* FERC, *Handbook for Hydroelectric Project Licensing*, *supra* note 22. That cooperation makes a virtue of necessity: FERC and the State each have a legal obligation to have an environmental document and other record as the basis for their respective decisions.

In most disputed relicensing proceedings in the past decade, the licensee and other parties have eventually reached settlement to propose conditions of the new license. Such settlement is submitted for approval as the basis of certification, mandatory conditions under FPA sections 4(e) and 18 (16 U.S.C. §§ 797(e), 811), and the license itself. The State will typically participate in the negotiation and help structure the settlement so as to provide an approvable basis for

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dismissal of a certification request in the absence of adequate information submitted by the applicant, here the licensee.

[24] The licensee submits its new license application, incorporating the study results and its recommendations for a new license, at least two years before expiration of the original license. *See* 16 U.S.C. § 808(c).

[25] Since Section 401 vests the State with exclusive authority to adopt certification conditions which must be incorporated into a license, the State must have whatever environmental documents and records required by State law to support such a binding decision in resource allocation. By contrast, the State may not use State law to require a licensee to provide information, and may not prepare its own environmental document, for any recommended condition submitted under FPA section 10(a) or 10(j), 16 U.S.C. § 803(a), (j); it is not actually making a binding decision, and the FPA preempts State law which might otherwise result in duplicative process for such conditions. *See Sayles Hydro Association et al. v. State Water Resources Control Board*, 985 F.2d 451 (9th Cir. 1993).

certification.[26] It is highly unusual that a challenge to a certification is not settled or is otherwise litigated beyond the state forum that has original jurisdiction for such challenge. *See United States Dep't of the Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992); *Roosevelt Campobello Int'l Park v. U.S. Environmental Protection Agency*, 604 F.2d 1041, 1056 (1st Cir. 1982).

Each new license includes conditions for protection, mitigation, and enhancement of environmental quality to comply with current laws, including the Clean Water Act. A certification expresses the State's judgment, based on the scientific record developed in the relicensing proceeding, of how best to attain all designated beneficial uses in the river reaches affected by an individual project. The certifications at issue in this case will assure that these projects correct their original non-attainment of the designated beneficial uses of the Presumpscot as well as the established dissolved oxygen standard (*see* Pet. App. at A-22). Unlike an NPDES permit, which reflects "technology-based limitations" for an entire category of point source, see 33 U.S.C. § 1342, these certifications reflect the idiosyncratic design, operation, and environmental conditions of the projects. Certifications for pro-

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[26] For example, in the relicensing proceedings for hydropower projects on the Raquette, Hudson, Mohawk, Sacandaga, Hoosic, Black, and Oswego Rivers in upstate New York, licensee Niagara Mohawk applied to the New York State Department of Environmental Conservation ("NYSDEC") for certifications. Niagara Mohawk and a conservation group, New York Rivers United, sought administrative rehearing before NYSDEC of the initial certification decisions. *See* NYSDEC, Office of Hearings and Mediation, *Niagara Mohawk Ruling* (April 20, 1994), *available at www.dec.state.ny.us/website/ohms/decis/nimor.htm*. The licensee, NYSDEC staff, and other parties subsequently reached settlements for all projects. NYSDEC incorporated these settlements into amended certifications. With the exception of one pending settlement reached in 2004, FERC has issued new licenses that incorporate the certifications and other conditions provided in the settlements.

jects elsewhere may use different measures to correct the same type of water quality impact. Thus, with respect to dissolved oxygen, projects in the Southeast—where summertime conditions typically cause stratification—may be required to make minimum flow discharges, like Warren, and also to use mechanical devices for reaeration of the flow discharged from the powerhouse. *See, e.g., P. No. 2146 License Application, supra*, 3-34.

States under Section 401, and FERC and other agencies with conditioning authorities under the FPA,[27] have adopted conditions that protect generation capacity of existing projects in a manner that also protects other beneficial uses of these waters. While Warren argues that certifications for its projects will reduce generation by 14% (Pet. Br. at 9), this

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[27] Under FPA section 10(a)(1), 16 U.S.C. § 803(a), the license must assure that a project is best adapted to a comprehensive plan of development of the affected waters for all beneficial uses, including electricity generation, water supply, flood control, recreation, and fish and wildlife. FERC adopts conditions under this authority, taking into account the recommendations of public agencies and other parties in the proceeding. Under FPA section 10(j), 16 U.S.C. § 803(j), FERC adopts recommendations submitted by fish and wildlife agencies for the protection, mitigation, and enhancement of fish and wildlife resources, unless it finds that the recommendations are inconsistent with FPA purposes. FPA section 10(a) and 10(j) are commonly known as "discretionary conditioning authorities," insofar as FERC has discretion what conditions to adopt. *See American Rivers v. FERC*, 201 F.3d 1186, 1204-05 (9th Cir. 2000).

The FPA includes two "mandatory conditioning authorities," Sections 4(e) and 18. Under Section 4(e), 16 U.S.C. § 797(e), the Interior or Agriculture Department may establish conditions for the protection and utilization of any federal reservation, such as a National Forest, occupied by a project. Under Section 18, 16 U.S.C. § 811, the U.S. Department of Interior or Commerce may prescribe (or reserve authority to subsequently prescribe) a fish ladder or other facility for passage of fish. FERC must incorporate any such conditions into a license. *See Escondido Mutual Water Company v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984); *American Rivers et al. v. FERC*, 187 F.3d 1007 (9th Cir. 1999).

impact reflects original design and operation whereby the dams frequently diverted all flow and dried up the bypass reaches of the Presumpscot. For all new licenses issued from 1986 to 2001, the conditions required under all CWA and FPA authorities reduced generation by an average of only 1.59%, while increasing generation capacity by 4.06%. FERC, *Report on Hydroelectric Licensing Policies, Procedures, and Regulations: Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000* 50 (2001). In exchange for this "modest" impact on electricity benefit, these projects—mostly designed and built generations ago—have been brought into compliance with water quality standards and other current requirements for protection and enhancement of environmental quality. *Id.*

Warren's theory, by exempting existing projects from Section 401, would impair this system of cooperative federalism. While a State would submit recommendations for protection of water quality or other beneficial uses under FPA section 10(a)(1) or 10(j), FERC would have discretion not to adopt such recommendations. Even today, if a State waives Section 401 in a particular proceeding by failing to act timely within one year of request, *see* 33 U.S.C. § 1341(a)(1), FERC believes that it does not have any obligation to assure attainment of water quality standards, or more specifically, to assure that the comprehensive plan it adopts under Section 10(a)(1) is consistent with those standards. *See Gustavus Electric Company*, 109 FERC ¶ 61,105, 61,461 (2004) (P. No. 11659); *Southern California Edison Company*, 113 FERC ¶ 61,063 (2005) (P. No. 1934). FERC has modified or rejected settlements that propose conditions under these discretionary authorities. *See, e.g., Dominion Generation*, 106 FERC ¶ 62,245 (2004) (P. No. 2009). If Warren's theory prevails, a typical licensee and FERC would probably cooperate less with the State in the study plan and the development of conditions for protection of water quality; neither would have an obligation to cooperate in the same manner as today.

Section 401, as interpreted by *Jefferson County PUD*, has motivated the cooperative regulation of hydropower projects to protect all beneficial uses, including electricity generation. While FERC has exclusive authority to issue licenses, Section 401 is the States' non-preempted authority to set minimum flow discharges or other operational conditions necessary for attainment of water quality standards. Given that check-and-balance, FERC and the States have developed procedures and practices, reflected in part in the Integrated Licensing Process, to cooperate effectively in the regulation of such projects.

CONCLUSION

Amici respectfully request that the Court affirm that the discharge of flow from an existing hydropower project is a "discharge" for the purpose of certification under Clean Water Act section 401(a)(1).

Respectfully submitted,

RICHARD ROOS-COLLINS
Counsel of Record
NATURAL HERITAGE INSTITUTE
100 Pine Street, Suite 1550
San Francisco, CA 94111
(415) 693-3000

STEVEN P. MALLOCH
10212 Belgrove Court, N.W.
Seattle, WA 98177
(206) 818-0482

January 6, 2006

APPENDIX A

Amici Curiae

J. David Allan received his Ph.D. (1971) from the University of Michigan. Following a post-doctoral year at the University of Chicago, he served on the Zoology faculty of the University of Maryland until 1990, when he moved to the University of Michigan, and where he is currently Professor of Conservation Biology and Ecosystem Management in the School of Natural Resources and Environment. Allan has served on study panels of the National Science Foundation and National Research Council, and on committees of the North American Benthological Society, Ecological Society of America, and American Society of Limnology and Oceanography. During 2004 he was a Smith Conservation Fellow with The Nature Conservancy, and he now serves on the Board of Trustees of the Michigan Chapter of TNC. Dr. Allan specializes in the ecology and conservation of rivers. He is the author of *Stream Ecology* and co-author (with C.E. Cushing) of *Streams: Their Ecology & Life*. He has published extensively on topics in community ecology and the influence of land-use on the ecological integrity of rivers. Dr. Allan's current research investigates landscape influences on river ecosystems at locations in Michigan and elsewhere, the factors affecting success of stream restoration, and the effects of altered flow regimes on rivers of the Great Lakes basin.

Michael T. Brett is an associate professor in the Department of Civil and Environmental Engineering at the University of Washington. His research focuses on the limnology of lakes and streams, anthropogenic impacts of nutrient loading on aquatic systems, food web interactions, and reservoir management. He is a member of the American Society of Limnology and Oceanography and the North American Lake Management Society. Michael Brett has published over 40 articles on lake and stream ecology. He received his doc-

torate in limnology from Uppsala University in Uppsala, Sweden.

William L. Graf is Foundation University Professor and Professor of Geography at the University of South Carolina. His specialties include fluvial geomorphology and hydrology, as well as policy for public land and water. His Ph.D. is from the University of Wisconsin, Madison, with a major in physical geography and a minor in water resources management. His research and teaching have focused on river-channel change and human impacts on river processes, including the downstream effects of large dams. He has authored or edited 9 books, more than 130 scientific papers, book chapters, and reports, more than 60 successful grant proposals, and more than 100 public presentations. He is past President of the Association of American Geographers and is a National Associate of the National Academy of Science. He has chaired numerous National Research Council committees dealing with river science and policy. President Clinton appointed him to the Presidential Commission on American Heritage Rivers.

Thomas Meixner is Professor of Hydrochemistry in the Department of Hydrology and Water Resources at the University of Arizona. With a doctoral degree in Hydrology and Water Resources and six years of experience as a professor of Watershed Biogeochemistry at the University of California, Riverside and more recently the University of Arizona, Dr. Meixner's research has focused on the hydrologic controls on water quality, and in particular on how the movement and transport of water affects nutrient availability and ecosystem productivity. Dr. Meixner has overseen over $1 million of research on these processes and published over 20 scientific articles on this topic. He has also served as an adviser to state water quality agencies in Arizona and California on matters of hydrologic controls on water quality and meeting proposed non-point source water quality standards.

Judy L. Meyer is Distinguished Research Professor of Ecology in the Institute of Ecology at the University of Georgia (UGA), Athens, Georgia. She holds a B.S. in Zoology from the University of Michigan, a M.S. in Zoology from the University of Hawaii, and a Ph.D. in Ecology from Cornell University. She has been on the faculty at UGA since 1977. She is an established leader in the field of aquatic ecology who has published over 150 scientific papers on her research on rivers and streams. Her research has focused on ecological processes that maintain water quality, on river and stream food webs, and on the impact of watershed disturbance, urban development, and riparian zone management on river and stream ecosystems. She has served as President of the Ecological Society of America and is a Fellow of the American Association for the Advancement of Science. She is currently a member of the Board on Environmental Studies and Toxicology and has served on the Water Science and Technology Board, both of which are boards of the National Academy of Sciences/National Research Council. She is a member of the Ecological Processes and Effects Committee of the Science Advisory Board of the Environmental Protection Agency. She is the recipient of the 2003 Award of Excellence in Benthic Science from the North American Benthological Society, a scientific society whose members study rivers and streams. Her current research is on urban streams, nitrogen cycling in streams, impacts of excessive sedimentation on aquatic biota, importance of decaying leaves and woody debris in stream ecosystems, impacts of changes in riparian buffer widths on trout streams, and effectiveness of stream restoration practices.

Peter B. Moyle has been studying the ecology and conservation of freshwater and estuarine fishes in California since 1969, including the impacts of dams and diversions. He has documented the declining status of many native species in California, such as coho and Chinook salmon, and has been active in developing conservation strategies for aquatic spe-

cies and ecosystems. He also studies the invasions of alien species and works on strategies for reducing their impacts. He was head of the Delta Native Fishes Recovery Team, a member of the National Research Council's Committee on Endangered and Threatened Fishes in the Klamath River Basin, and a member of the Science Board for the CALFED Ecosystem Restoration Program. He is author/coauthor of over 160 scientific papers and 5 books. His books include *Inland Fishes of California* (2002), the definitive tome on California's freshwater fishes, and the nation's leading ichthyology text (5th edition, 2004). He is a professor of fish biology in the Department of Wildlife, Fish, and Conservation Biology, University of California, Davis, where he teaches basic courses in ichthyology, watershed ecology, and wildlife conservation. He is also associate director of the Center for Watershed Sciences. He currently shares the President's Chair in Undergraduate Education with Jeffrey Mount, Geology.

Sam Pearsall is Director of Science and Roanoke River Project Director for the North Carolina Chapter of The Nature Conservancy, adjunct professor of geography and ecology at the University of North Carolina at Chapel Hill, and adjunct professor at the Duke University Nicholas School of the Environment and Earth Sciences. He was The Nature Conservancy's chief negotiator in the relicensing of FERC Project 2009 owned by Virginia Electric and Power Company. Dr. Pearsall holds advanced degrees in landscape ecology (Geography Department, University of Hawaii, East-West Center fellow) and natural resources policy and planning (Cornell University). He is author of more than 30 technical journal articles and book chapters and a member of several professional associations and societies. His expertise includes the impacts of altered hydrological regimes on southeastern floodplain ecosystems. Dr. Pearsall joins this brief in his capacity as an expert and not in his capacity as an employee or representative of The Nature Conservancy.

N. LeRoy Poff is Associate Professor of Biology at Colorado State University. Dr. Poff is an international leader in the field of "hydro-ecology," the science that examines how streamflow dynamics dictate the structure, function and resilience of stream and river ecosystems. His 70-plus peer-reviewed publications are mostly in this area, and he has given invited Plenary presentations on the subject at several international meetings and workshops in the last four years, including in England, Spain, Australia, South Korea and the United States. Most notably, Dr. Poff was lead author on the highly influential 1997 paper, *The Natural Flow Regime*, which has been cited on average 50 times a year in the peer-reviewed scientific literature and is viewed as a conceptual foundation for river restoration around the world. Dr. Poff is a Fellow of the Aldo Leopold Leadership Society (Ecological Society of America), and he is President-elect of the North American Benthological Society, the leading international science society in stream and river ecology. He has served as a member of the National Research Council Committee on Water Resources that evaluates the scientific programs of the U.S. Geological Society.

S. Geoffrey Schladow is professor of Civil and Environmental Engineering at UC Davis, and Director of the UC Davis Tahoe Environmental Research Center. His research interests include mixing and transport processes in aquatic systems, water quality modeling, and the linkages between fluid mechanics and the determinants of water quality and ecological well-being. He has published widely in the area of the thermal regime of reservoirs and lakes. Professor Schladow is a member of the American Society of Civil Engineers, the American Society for Limnology and Oceanography, and the American Geophysical Union, and is Associate Editor of Water Resources Research. He earned his Bachelor of Engineering in Civil Engineering at the University of Western Australia, his Masters of Engineering in Hydraulic Engineering at the University of California, Berke-

ley, and his Ph.D. in Civil Engineering at the University of Western Australia.

The Association of State Wetland Managers is a 501(c)(3), not-for-profit corporation formed to build the capacity of states in cooperation with the efforts of local governments, not-for-profits, federal agencies, and others to protect and restore wetland and related ecosystems. It conducts "applied science" research and training programs pertaining to wetlands and related floodplain, riparian, and river ecosystems. It has conducted over 50 workshops, symposia, and training sessions over the last 22 years and published more than 30 reports and books. It has conducted national symposia on wetland restoration, workshops on stream restoration, and over a dozen workshops on wetlands and watershed management. Clear Water Act section 401 certification and dam issues have been included in special sessions in a number of these symposia and workshops including a workshop and white paper that focused specifically on scientific issues related to dam removal activities in the Northeast.

APPENDIX B

Projects Licensed between November 30, 1995 and November 30, 2005

	State	Licensing Order	Type Of License	WQ Certification
1.	KY	Louisville Gas and Electric Company, 113 FERC ¶ 62,078, 2005 WL 2800096 (2005) (P. No. 289-013)	New	Waived
2.	NY	Erie Boulevard Hydropower, L.P., 113 FERC ¶ 62,079, 2005 WL 2800097 (2005) (P. No. 7387-019)	New	Yes
3.	NC	Coxlake Carbonton Associates, LLC, 113 FERC ¶ 62,004, 2005 WL 2437745 (2005) (P. No. 3155-027, -028)	Subsequent	Yes
4.	WI	Fox Paper Company and N.E.W. Hydro, Inc., 112 FERC ¶ 62,187, 2005 WL 2129126 (2005) (P. No. 7264-010)	Subsequent	Yes
5.	WI	Flambeau Hydro LLC, 112 FERC ¶ 62,130, 2005 WL 1926933 (2005) (P. No. 2064-004)	New	Yes
6.	IL	Price Dam Partnership, Limited, 112 FERC ¶ 62,090, 2005 WL 1794070 (2005) (P. No. 12187-000)	Original	Yes

	State	Licensing Order	Type Of License	WQ Certifi-cation
7.	WA	Public Utility District No. 1 of Pend Oreille County, 112 FERC ¶ 61,055, 2005 WL 1609337 (2005) (P. No. 2042-013)	New	Yes
8.	PA	PPL Holtwood, LLC, 112 FERC ¶ 62,012, 2005 WL 1596690 (2005) (P. No. 487-034)	New	Yes
9.	OR	Portland General Electric Company and Confederated Tribes of the Warm Springs Reservation of Oregon, 111 FERC ¶ 61,450, 2005 WL 1459997 (2005) (P. No. 2030-036)	New	Yes
10.	VT	Central Vermont Public Service Corporation, 111 FERC ¶ 62,313, 2005 WL 1428792 (2005) (P. No. 2205-006)	New	Waived
11.	UT	Monroe City, 111 FERC P 62,247, 2005 WL 1315043 (2005) (P. No. 632-009)	Subse-quent	Yes
12.	IL	Midwest Hydro, Inc., 111 FERC ¶ 61,327, 2005 WL 1301790 (2005) (P. No. 287-009)	New	Waived
13.	WI	Northern States Power Company, 111 FERC ¶ 62,212, 2005 WL 1233222 (2005) (P. No. 2181-014)	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
14.	WI	Northern States Power Company, 111 FERC ¶ 62,123, 2005 WL 1031393 (2005) (P. No. 2697-014)	New	Yes
15.	WI	Neshkoro Power Associates, LLC, 111 FERC ¶ 62,099, 2005 WL 951212 (2005) (P. No. 12449-000)	Original	Waived
16.	WI	Mosinee Paper Corporation, 111 FERC ¶ 62,033, 2005 WL 778750 (2005) (P. No. 2207-009)	New	Yes
17.	ID	Idaho Power Company, 110 FERC ¶ 61,345, 2005 WL 681940 (2005) (P. No 2726-012)	New	Yes
18.	WI	International Paper Company, 110 FERC ¶ 62,239, 2005 WL 556012 (2005) (P. No. 4914-010)	Subsequent	Yes
19.	WI	Wisconsin Public Service Corporation, 110 FERC ¶ 62,215, 2005 WL 510778 (2005) (P. No. 1979-012)	New	Yes
20.	ME	Merimil Limited Partnership, 110 FERC ¶ 61,240, 2005 WL 510785 (2005) (P. No. 2574-032)	New	Yes
21.	WI	PCA Hydro Inc., 110 FERC ¶ 62,010, 2005 WL 23971 (2005) (P. No. 2180-007)	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
22.	MI	City of Norway, Michigan, 110 FERC ¶ 62,011, 2005 WL 23975 (2005) (P. No. 2720-036)	New	Yes
23.	GA	Georgia Power Company, 109 FERC ¶ 62,246, 2004 WL 2980839 (2004) (P. No. 2177-053)	New	Yes
24.	ME	Great Lakes Hydro American, LLC, 109 FERC ¶ 62,230, 2004 WL 2967009 (2004) (P. No. 2634-007)	New	Yes
25.	NY	Erie Boulevard Hydropower, L.P., 109 FERC ¶ 62,141, 2004 WL 2714028 (2004) (P. No. 2474-004)	New	Yes
26.	MN	Ford Motor Company, 109 FERC ¶ 62,102, 2004 WL 2619908 (2004) (P. No. 362-004)	New	Waived
27.	ID	Fall River Rural Electric Cooperative, Inc., 109 FERC ¶ 62,077, 2004 WL 2491824 (2004) (P. No. 1413-032)	Subsequent	Waived
28.	AK	Gustavus Electric Company, 109 FERC ¶ 61,105, 2004 WL 2430246 (2004) (P. No 11659-002)	New	Waived
29.	PA	Reliant Energy Mid-Atlantic Holdings, LLC, 108 FERC ¶ 62,216, 2004 WL 1955415 (2004) (P. No. 309-036)	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
30.	CA	Southern California Edison Company, 108 FERC ¶ 62,217, 2004 WL 1955416 (2004) (P. No. 372-008)	New	Yes
31.	NY	New York State Electric & Gas Company New York, 108 FERC ¶ 62,168, 2004 WL 1843303 (2004) (P. No. 2835-005)	New	Waived
32.	ID	Idaho Power Company, 108 FERC ¶ 61,129, 2004 WL 1740092 (2004) (P. No. 2055-010)	New	Yes
33.	ID	Idaho Power Company, 108 FERC ¶ 61,127, 2004 WL 1740093 (2004) (P. No. 2061-004)	New	Yes
34.	ID	Idaho Power Company, 108 FERC ¶ 61,126, 2004 WL 1740094 (2004) (P. No. 2777-007)	New	Yes
35.	ID	Idaho Power Company, 108 FERC ¶ 61,125, 2004 WL 1740095 (2004) (P. No. 2778-005)	New	Yes
36.	ID	Idaho Power Company, 108 FERC ¶ 61,128, 2004 WL 1760005 (2004) (P. No. 1975-014)	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
37.	WA	Puget Sound Energy, Inc., 107 FERC ¶ 61,331, 2004 WL 1472554 (2004) (P. No. 2493-006)	New	Yes
38.	CT	Northeast Generation Services Company, 107 FERC ¶ 61,305, 2004 WL 1400148 (2004) (P. No. 2576-022, 2597-019)	New	Yes
39.	VT	Barton Village, Inc., 107 FERC ¶ 62,217, 2004 WL 1260992 (2004) (P. No. 7725-005)	Subsequent	Yes
40.	WA	Trinity Conservancy, Incorporated, 107 FERC ¶ 62,188, 2004 WL 1174508 (2004) (P. No. 719-007)	Subsequent	Yes
41.	WV	Allegheny Energy Supply Company, LLC, 107 FERC ¶ 62,130, 2004 WL 1060693 (2004) (P. No. 2517-012)	Subsequent	Yes
42.	WV	Allegheny Energy Supply Company, LLC, 107 FERC ¶ 62,131, 2004 WL 1060694 (2004) (P. No. 2516-026)	New	Yes
43.	WI	Dairyland Power Cooperative, 107 FERC ¶ 62,043, 2004 WL 821524 (2004) (P. No. 1960-002)	New	Yes
44.	MN	ALLETE, Inc., 107 FERC ¶ 62,036, 2004 WL 821518 (2004) (P. No. 469-013)	New	Waived

	State	Licensing Order	Type Of License	WQ Certification
45.	ME	Ridgewood Maine Hydro Partners, L.P., 107 FERC ¶ 62,006, 2004 WL 757862 (2004) (P. No. 11472-000)	Original	Yes
46.	NC	Virginia Electric and Power Company, dba Dominion Virginia Power/Dominion North Carolina Power, 106 FERC ¶ 62,245, 2004 WL 715833 (2004) (P. No. 2009-018)	New	Waived
47.	ME	FPL Energy Maine Hydro LLC, 106 FERC ¶ 62,232, 2004 WL 628683 (2004) (P. No. 2612-005)	New	Yes
48.	VT	Village of Lyndonville Electric Department, 106 FERC ¶ 62,187, 2004 WL 473235 (2004) (P. No. 3090-008)	Subsequent	Yes
49.	MN	Northern States Power Company, 106 FERC ¶ 62,185, 2004 WL 424019 (2004) (P. No. 2056-016)	New	Yes
50.	ME	FPL Energy Maine Hydro, LLC, 106 FERC ¶ 62,021, 2004 WL 64089 (2004) (P. No. 2142-031)	New	Yes
51.	NY	New York State Electric & Gas Corporation, 105 FERC ¶ 61,381, 2003 WL 23011910 (2003) (P. No. 2852-015)	New	Yes

	State	Licensing Order	Type Of License	WQ Certifi-cation
52.	AK	Lake Dorothy Hydro, Inc., 105 FERC ¶ 62,223, 2003 WL 23634173 (2003) (P. No. 12379-000)	Original	Yes
53.	ID	PacifiCorp, 105 FERC ¶ 62,207, 2003 WL 22999473 (2003) (P. No. 20-019, 2401-007, 472-017)	New	Yes
54.	ME	Ridgewood Maine Hydro Partners, L.P., 105 FERC ¶ 62,137, 2003 WL 22867429 (2003) (P. No. 11566-000)	Original	Yes
55.	CA	Southern California Edison Company, 105 FERC ¶ 62,146, 2003 WL 22867437 2003) (P. No. 2017-011)	New	Yes
56.	MI	City of Sturgis, Michigan, 105 FERC ¶ 62,132, 2003 WL 22815315 (2003) (P. No. 2964-006)	New	Yes
57.	IL	Marseilles Hydro Power, LLC Marseilles Land and Water Company, 105 FERC ¶ 62,131, 2003 WL 22815316 (2003) (P. No. 12020-000, 11863-000)	Original	Waived
58.	VT	Citizens Utilities Company, 105 FERC ¶ 62,119, 2003 WL 22758081 (2003) (P. No. 2306-008, -024)	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
59.	OR	PacifiCorp, 105 FERC ¶ 61,237, 2003 WL 22812428 (2003) (P. No. 1927-008)	New	Yes
60.	UT	Parowan City, 105 FERC ¶ 62,090, 2003 WL 23634169 (2003) (P. No. 1273-009)	Subsequent	Yes
61.	NY	New York Power Authority Massachusetts Municipal Wholesale Electric Company v. Power Authority of the State of New York, 105 FERC ¶ 61,102, 2003 WL 22422346 (2003) (P. No. 2000-036, EL03-224-000)	New	Yes
62.	MI	Charter Township of Ypsilanti, Michigan, 105 FERC ¶ 62,019, 2003 WL 22351633 (2003) (P. No. 5334-019)	New	Yes
63.	MI	City of Hart, Michigan, 105 FERC ¶ 62,004, 2003 WL 22273226 (2003) (P. No. 3516-008)	Subsequent	Yes
64.	ME	S.D. Warren Company, 105 FERC ¶ 61,012, 2003 WL 22273231 (2003) (P. No. 2941-002) SEE, S.D. Warren Company, 105 FERC ¶ 61,013, 2003 WL 22279522 (2003) (P. No. 2897-003, 2932-003, 2941-002, 2931-002, 2942-005)	Subsequent	Yes

	State	Licensing Order	Type Of License	WQ Certification
65.	ME	S.D. Warren Company, 105 FERC ¶ 61,010, 2003 WL 22279523 (2003) (P. No. 2931-002)	Subsequent	Yes
66.	ME	S.D. Warren Company, 105 FERC ¶ 61,011, 2003 WL 22279524 (2003) (P. No. 2932-003)	Subsequent	Yes
67.	ME	S.D. Warren Company, 105 FERC ¶ 61,009, 2003 WL 22279525 (2003) (P. No. 2942-005)	New	Yes
68.	ID	American Falls Reservoir District No. 2 Big Wood Canal Company, 104 FERC ¶ 62,216, 2003 WL 22222703 (2003) (P. No. 12423-000)	Original	Yes
69.	MI	Grande Pointe Power Corporation, 104 FERC ¶ 62,213, 2003 WL 22207024 (2003) (P. No. 11797-000)	Original	Yes
70.	CA	Pacific Gas & Electric Company, 104 FERC ¶ 62,198, 2003 WL 22147514 (2003) (P. No. 1354-005)	New	Waived
71.	CA	Utica Power Authority, 104 FERC ¶ 62,160, 2003 WL 22054283 (2003) (P. No. 2699-001)	Subsequent	Yes

	State	Licensing Order	Type Of License	WQ Certification
72.	CA	Utica Power Authority, 104 FERC ¶ 62,162, 2003 WL 22054284 (2003) (P. No. 2019-017, 2019-023)	New	Yes
73.	CA	Northern California Power Agency, 104 FERC ¶ 62,163, 2003 WL 22054285 (2003) (P. No. 11563-002)	New	Yes
74.	AK	City of Petersburg, Alaska, 104 FERC ¶ 62,151, 2003 WL 22018592 (2003) (P. No. 201-014)	New	Waived
75.	WI	Rhinelander Paper Company, 104 FERC ¶ 62,134, 2003 WL 21979859 (2003) (P. No. 2161-006)	New	Yes
76.	MI	Upper Peninsula Power Company, 104 FERC ¶ 62,135, 2003 WL 21979860 (2003) (P. No. 1864-005)	New	Waived
77.	NY	Orion Power New York GP II, Inc., 104 FERC ¶ 62,118, 2003 WL 21954213 (2003) (P. No. 7000-015)	New	Yes
78.	WI	Consolidated Water Power Company, 104 FERC ¶ 62,070, 2003 WL 21757460 (2003) (P. No. 2110-003)	New	Waived
79.	WI	Consolidated Water Power Company, 104 FERC ¶ 62,071, 2003 WL 21757461 (2003) (P. No. 2192-008)	New	Waived

	State	Licensing Order	Type Of License	WQ Certification
80.	MT	PacifiCorp, 104 FERC ¶ 62,059, 2003 WL 21725991 (2003) (P. No. 2652-007)	New	Yes
81.	ME	Madison Paper Industries, Inc., 104 FERC ¶ 62,061, 2003 WL 21725997 (2003) (P. No. 2364-013)	New	Yes
82.	ME	Madison Paper Industries, Inc., 104 FERC ¶ 62,060, 2003 WL 21725996 (2003) (P. No. 2365-024)	New	Yes
83.	CA	Southern California Edison Company, 104 FERC ¶ 62,048, 2003 WL 21696019 (2003) (P. No. 1934-010)	New	Waived
84.	CA	Southern California Edison Company, 104 FERC ¶ 62,011, 2003 WL 21536024 (2003) (P. No. 1933-010)	New	Yes
85.	CA	Southern California Edison Company, 103 FERC ¶ 62,183, 2003 WL 22208048 (2003) (P. No. 1932-004)	New	Waived
86.	MN	ALLETE, Inc., 103 FERC ¶ 62,114, 2003 WL 21236618 (2003) (P. No. 346-037)	New	Waived
87.	MI	Indiana Michigan Power Company, 103 FERC ¶ 62,025, 2003 WL 1900897 (2003) (P. No. 401-027)	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
88.	UT	Parowan City, 103 FERC ¶ 62,015, 2003 WL 1866388 (2003) (P. No. 2782-006)	Subsequent	Yes
89.	CA	Pacific Gas and Electric Company, 102 FERC ¶ 61,309, 2003 WL 1384039 (2003) (P. No. 2687-014)	New	Yes
90.	WI	Oconto Electric Cooperative, 102 FERC ¶ 62,129, 2003 WL 21436783 (2003) (P. No. 1981-010)	New	Yes
91.	CO	Woods Lake Hydro, 102 FERC ¶ 62,120, 2003 WL 732888 (2003) (P. No. 3410-009)	Subsequent	Yes
92.	CO	Judith A. Burford, 102 FERC ¶ 62,004, 2003 WL 42433 (2003) (P. No. 6418-007)	Subsequent	Yes
93.	WI	Northern States Power Company, 101 FERC ¶ 62,211, 2002 WL 31926422 (2002) (P. No. 2567-009)	New	Yes
94.	WI	Northern States Power Company and the City of Eau Claire, Wisconsin, 101 FERC ¶ 62,212, 2002 WL 31926423 (2002) (P. No. 2670-014)	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
95.	WI	Northern States Power Company Wisconsin, 101 FERC ¶ 62,213, 2002 WL 31926424 (2002) (P. No. 1982-017)	New	Yes
96.	AR	Entergy Arkansas, Inc., 101 FERC ¶ 62,201, 2002 WL 31926418 (2002) (P. No. 271-062)	New	Yes
97.	ME	FPL Energy Maine Hydro LLC, 101 FERC ¶ 62,179, 2002 WL 31889943 (2002) (P. No. 11834-000)	Original	Yes
98.	UT	City of Springville, 101 FERC ¶ 62,160, 2002 WL 31947868 (2002) (P. No. 2031-046)	New	Yes
99.	NY	Erie Boulevard Hydropower L.P., 101 FERC ¶ 62,090, 2002 WL 31989020 (2002) (P. No. 2616-004, -022)	New	Yes
100.	CA	Pacific Gas and Electric Company, 101 FERC ¶ 61,165, 2002 WL 31973959 (2002) (P. No. 2661-012)	New	Yes
101.	NY	Hydro Development Group, Inc., 101 FERC ¶ 61,097, 2002 WL 31974177 (2002) (P. No. 6058-005)	Subsequent	Yes

	State	Licensing Order	Type Of License	WQ Certification
102.	NY	Hydro Development Group, Inc., 101 FERC ¶ 61,100, 2002 WL 31975584 (2002) (P. No. 6059-006)	Subsequent	Yes
103.	AK	Alaska Power and Telephone Company, 101 FERC ¶ 62,030, 2002 WL 31342026 (2002) (P. No. 11588)	Original	Waived
104.	MI	Upper Peninsula Power Company, 101 FERC ¶ 62,013, 2002 WL 31974418 (2002) (P. No. 10855-002)	Original	Yes
105.	MI	Marquette Board of Light and Power, 101 FERC ¶ 62,014, 2002 WL 31989018 (2002) (P. No. 2589-024, -026)	New	Yes
106.	NY	Erie Boulevard Hydropower L.P., 100 FERC ¶ 62,208, 2002 WL 31993492 (2002) (P. No. 10461-002, 10462-002)	Original	Yes
107.	NY	Hudson River-Black River Regulating District, 100 FERC ¶ 61,319, 2002 WL 31975704 (2002) (P. No. 12252-000)	New	Yes
108.	NY	Erie Boulevard Hydropower, L.P., 100 FERC ¶ 61,320, 2002 WL 31975705 (2002) (P. No. 2554-003, 2554-012)	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
109.	NY	Erie Boulevard Hydropower, L.P., 100 FERC ¶ 61,322, 2002 WL 31975708 (2002) (P. No. 2318-002, 2318-011)	New	Yes
110.	NY	Erie Boulevard Hydropower, L.P., 100 FERC ¶ 61,318, 2002 WL 31119053 (2002) (P. No. 2047-004, 2047-011)	New	Yes
111.	NY	Erie Boulevard Hydropower, L.P., 100 FERC ¶ 61,317, 2002 WL 31119052 (2002) (P. No. 2482-014, 2482-029)	New	Yes
112.	WI	Wisconsin Power and Light Company, 99 FERC ¶ 62,225, 2002 WL 1393969 (2002) (P. No. 11162-002)	Original	Waived
113.	SC	South Carolina Electric & Gas Company, 99 FERC ¶ 62,152, 2002 WL 1072297 (2002) (P. No. 1895-007)	New	Yes
114.	ID	Atlanta Power Company, 99 FERC ¶ 62,104, 2002 WL 938911 (2002) (P. No. 11541-001)	Original	Yes
115.	MA	Woronoco Hydro, LLC, 99 FERC ¶ 62,075, 2002 WL 789781 (2002) (P. No. 2631-007)	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
116.	NH	USGen New England, Inc., 99 FERC ¶ 62,025, 2002 WL 529393 (2002) (P. No. 2077-016)	New	Yes
117.	SC	Aquenergy Systems, Inc., 99 FERC ¶ 62,019, 2002 WL 505900 (2002) (P. No. 2416-009)	New	Yes
118.	NC	Nantahala Power and Light, 98 FERC ¶ 62,214, 2002 WL 471193 (2002) (P. No. 2694-002)	Subsequent	Yes
119.	WI	City of Black River Falls, Wisconsin, 98 FERC ¶ 62,209, 2002 WL 471194 (2002) (P. No. 3052-003)	Subsequent	Yes
120.	MI	Commonwealth Power Company, 98 FERC ¶ 62,212, 2002 WL 467226 (2002) (P. No. 11300-000)	New	Yes
121.	MI	Commonwealth Power Company, 98 FERC ¶ 62,211, 2002 WL 467227 (2002) (P. No. 11120-002)	New	Yes
122.	MI	Commonwealth Power Company, 98 FERC ¶ 62,210, 2002 WL 467229 (2002) (P. No. 11516-000)	New	Yes
123.	WA	City of Tacoma, Washington, 98 FERC ¶ 61,274, 2002 WL 398311 (2002) (P. No. 2016-044)	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
124.	NY	Erie Boulevard Hydropower, L.P., 98 FERC ¶ 61,146, 2002 WL 226233 (2002) (P. No. 2060-005, 002)	New	Yes
125.	NY	Erie Boulevard Hydropower, L.P., 98 FERC ¶ 61,145, 2002 WL 226235 (2002) (P. No. 2084-020, 006)	New	Yes
126.	NY	Erie Boulevard Hydropower, L.P., 98 FERC ¶ 61,149, 2002 WL 226237 (2002) (P. No. 2320-005, 012)	New	Yes
127.	NY	Erie Boulevard Hydropower, L.P., 98 FERC ¶ 61,143, 2002 WL 226241 (2002) (P. No. 2330-007, 2330-033, 2320-012, 2084-006, 2060-002)	New	Yes
128.	OH	City of Hamilton, Ohio, 97 FERC ¶ 62,267, 2001 WL 1638772 (2001) (P. No. 2724-023)	New	Yes
129.	WI	Wisconsin River Power Company, 97 FERC ¶ 62,205, 2001 WL 1559007 (2001) (P. No. 1984-056)	New	Waived
130.	MI	Black River Limited Partnership, 97 FERC ¶ 62,194, 2001 WL 1538052 (2001) (P. No. 11730-00)	Original	Yes

	State	Licensing Order	Type Of License	WQ Certifi-cation
131.	MI	City of St. Louis, Michigan, 97 FERC ¶ 62,184, 2001 WL 1512943 (2001) (P. No. 11428-00)	Original	Waived
132.	NY	Finch, Pruyn and Company, Inc., 97 FERC ¶ 62,170, 2001 WL 1476147 (2001) (P. No. 2385-002)	New	Yes
133.	CA	Pacific Gas & Electric Company, 97 FERC ¶ 61,084, 2001 WL 1297750 (2001) (P. No. 1962-000, 028)	New	Waived
134.	VA	Nekoosa Packaging Corporation, 97 FERC ¶ 62,032, 2001 WL 1215943 (2001) (P. No. 2902-009)	Subse-quent	Waived
135.	VA	Nekoosa Packaging Corporation, 97 FERC ¶ 62,033, 2001 WL 1215944 (2001) (P. No. 2901-008)	New	Waived
136.	CA	Pacific Gas and Electric Company, 97 FERC ¶ 61,031, 2001 WL 1522250 (2001) (P. No. 137-002)	New	Yes
137.	MI	Cameron Gas and Electric Company, 96 FERC ¶ 62,182, 2001 WL 959561 (2001) (P. No. 11150-000)	Original	Waived

	State	Licensing Order	Type Of License	WQ Certification
138.	VT	Central Vermont Public Service Corporation, 96 FERC ¶ 62,097, 2001 WL 870115 (2001) (P. No. 2731-020)	New	Yes
139.	VT	Central Vermont Public Service Corporation, 96 FERC P 62,098, 2001 WL 870116 (2001) (P. No. 2737-002)	New	Yes
140.	GA	Fall Line Hydro Company, Inc., 96 FERC ¶ 62,091, 2001 WL 864315 (2001) (P. No. 11301-001)	New	Yes
141.	GA	Fall Line Hydro Company, Inc., 96 FERC ¶ 62,091 (2001) (P. No. 11301-001)	New	Yes
142.	MI	Consumers Energy Company, 95 FERC ¶ 62,246, 2001 WL 700769 (2001) (P. No. 2566-010)	New	Yes
143.	MI	City of Portland, Michigan, 95 FERC ¶ 62,245, 2001 WL 34077127 (2001) (P. No. 11616-000)	Original	Waived
144.	CO	City and County of Denver, Colorado, 94 FERC ¶ 61,313, 2001 WL 1834126 (2001) (P. No. 2035-006)	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
145.	CA	Pacific Gas and Electric Company California, 94 FERC ¶ 62,188, 2001 WL 1834141 (2001) (P. No. 1988-007)	New	Waived
146.	MA	Aquamac Corporation, 94 FERC ¶ 62,182, 2001 WL 1842444 (2001) (P. No. 2927-004)	Subsequent	Waived
147.	MA	Merrimac Paper Company, Inc., 94 FERC ¶ 62,183, 2001 WL 1842445 (2001) (P. No. 2928-004)	Subsequent	Waived
148.	CT	Summit Hydropower, 94 FERC ¶ 61,203, 2001 WL 275412 (2001) (P. No. 10822-000)	Original	Yes
149.	CT	Summit Hydropower, 94 FERC ¶ 61,193, 2001 WL 1439696 (2001) (P. No. 10823-000)	Original	Yes
150.	MI	Wisconsin Electric Power Company, 94 FERC ¶ 61,039, 2001 WL 40124 (2001) (P. No. 11831-000)	New	Yes
151.	MI	Wisconsin Electric Power Company, 94 FERC ¶ 61,040, 2001 WL 40125 (2001) (P. No. 11830-000)	New	Yes
152.	MI	Wisconsin Electric Power Company, 94 FERC ¶ 61,037, 2001 WL 40126 (2001) (P. No. 1759-036,	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
		1980-009, 2072-008, 2073-008, 2074-007, 2131-020, 2471-005, 11830-000, SA98-10-000)		
153.	MI	Wisconsin Electric Power Company, 94 FERC ¶ 61,029, 2001 WL 40127 (2001) (P. No. 1980-009)	New	Yes
154.	MI	Wisconsin Electric Power Company, 94 FERC ¶ 61,041, 2001 WL 40128 (2001) (P. No. 2072-008)	New	Yes
155.	MI	Wisconsin Electric Power Company, 94 FERC ¶ 61,035, 2001 WL 40129 (2001) (P. No. 2073-008)	New	Yes
156.	MI	Wisconsin Electric Power Company, 94 FERC ¶ 61,036, 2001 WL 40132 (2001) (P. No. 2074-007)	New	Yes
157.	MI	Wisconsin Electric Power Company, 94 FERC ¶ 61,028, 2001 WL 40133 (2001) (P. No. 2131-020)	New	Yes
158.	IN	Indiana Michigan Power Company, 94 FERC ¶ 62,035, 2001 WL 1819357 (2001) (P. No. 184-074)	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
159.	AK	Alaska Village Electric Cooperative, 93 FERC ¶ 62,190, 2000 WL 1816883 (2000) (P. No. 11690-001)	Original	Waived
160.	OH	Stockport Mill Country Inn Universal Electric Power Corporation, 93 FERC ¶ 62,180, 2000 WL 1791662 (2000) (P. No. 11685-001, 1648-000)	Original	Yes
161.	IL	Metropolitan Water Reclamation District of Greater Chicago Illinois, 93 FERC ¶ 62,080, 2000 WL 1649527 (2000) (P. No. 2866-008)	New	Waived
162.	AK	Haida Corporation, 93 FERC ¶ 62,055, 2000 WL 1594410 (2000) (P. No. 11480-001)	Original	Waived
163.	MT	PP&L Montana, LLC, 92 FERC ¶ 61,261, 2000 WL 1429681 (2000) (P. No. 2188-030)	New	Yes
164.	WY	Lower Valley Energy, Inc., 92 FERC ¶ 62,222, 2000 WL 1310687 (2000) (P. No. 2032-001)	New	Yes
165.	AK	City of Ketchikan, Alaska, 92 FERC ¶ 62,183, 2000 WL 33730159 (2000) (P. No. 420-009)	New	Waived

	State	Licensing Order	Type Of License	WQ Certification
166.	UT	PacifiCorp, 91 FERC ¶ 62,143, 2000 WL 681966 (2000) (P. No. 2722-008)	New	Yes
167.	NY	John M. Skorupski, 91 FERC ¶ 62,070, 2000 WL 523163 (2000) (P. No. 2487-006)	Subsequent	Yes
168.	NY	Curtis/Palmer Hydroelectric Company LP International Paper Company, 91 FERC ¶ 61,112, 2000 WL 502754 (2000) (P. No. 2609-013)	New	Yes
169.	OR	John H. Bigelow, 91 FERC ¶ 62,022, 2000 WL 366448 (2000) (P. No. 11512-000)	Original	Yes
170.	WI	City of Kaukauna, 91 FERC ¶ 62,029, 2000 WL 366450 (2000) (P. No. 2588-004)	New	Yes
171.	ID, MT	Avista Corporation, 90 FERC ¶ 61,167, 2000 WL 216309 (2000) (P. No. 2058-014)	New	Yes
172.	UT	PacifiCorp, 88 FERC ¶ 62,300, 1999 WL 774537 (1999) (P. No. 597-003)	Subsequent	Yes

	State	Licensing Order	Type Of License	WQ Certification
173.	SC	Lockhart Power Company, 88 FERC ¶ 62,301, 1999 WL 774538 (1999) (P. No. 2620-005)	New	Yes
174.	GA	Georgia Power Company, 88 FERC ¶ 62,314, 1999 WL 774553 (1999) (P. No. 1218-014)	New	Yes
175.	RI	Summit Hydropower Incorporated, 88 FERC ¶ 62,298, 1999 WL 768875 (1999) (P. No. 11282-001)	Original	Waived
176.	CT	City of Norwich, Department of Public Utilities, 88 FERC ¶ 62,299, 1999 WL 768874 (1999) (P. No. 11574-000)	Original	Yes
177.	MA	Holyoke Water Power Company Holyoke Gas & Electric Department, Ashburnham Municipal Light Plant, and Massachusetts Municipal Wholesale Electric Company, 88 FERC ¶ 61,186, 1999 WL 637628 (1999) (P. No. 2004-073, 11607-000)	New	Yes
178.	VT	Green Mountain Power Corporation, 88 FERC ¶ 62,095, 1999 WL 553846 (1999) (P. No. 2674-003)	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
179.	ME	Kennebec Water District, 88 FERC ¶ 61,117, 1999 WL 549656 (1999) (P. No. 2555-001)	Subsequent	Yes
180.	ME	FPL Energy Maine Hydro LLC, 88 FERC ¶ 61,122, 1999 WL 549658 (1999) (P. No. 2556-004, 2557-004, 2559-003)	New	Yes
181.	ID	City of Bonners Ferry, Idaho, 87 FERC ¶ 62,262, 1999 WL 371938 (1999) (P. No. 1991-009)	New	Yes
182.	UT	Heber Light and Power Company, 87 FERC ¶ 62,155, 1999 WL 281330 (1999) (P. No. 1994-004)	New	Yes
183.	ME	Bangor Hydroelectric Company, 86 FERC ¶ 62,242, 1999 WL 167743 (1999) (P. No. 2666-007)	New	Yes
184.	MN	Crown Hydro Company, 86 FERC ¶ 62,209, 1999 WL 148450 (1999) (P. No. 11175-002)	New	Yes
185.	CA	Southern California Edison Company, 86 FERC ¶ 61,230, 1999 WL 105632 (1999) (P. No. 1390-001)	New	Waived

	State	Licensing Order	Type Of License	WQ Certification
186.	ID	J.M. Miller, Enterprises, Inc., 86 FERC ¶ 62,121, 1999 WL 65057 (1999) (P. No. 11060-001)	Original	Waived
187.	MI	Thunder Bay Power Company, 85 FERC ¶ 62,160, 1998 WL 855083 (1998) (P. No. 2404-017, 2419-007)	New	Yes
188.	OR	City of Albany, Oregon, 85 FERC ¶ 62,046, 1998 WL 804391 (1998) (P. No. 11509-000)	Original	Yes
189.	MI	Wolverine Power Corporation, 85 FERC ¶ 61,063, 1998 WL 721604 (1998) (P. No. 10808-000)	Original	Waived
190.	MI	Wolverine Power Corporation, 85 FERC ¶ 61,064, 1998 WL 721605 (1998) (P. No. 10809-000)	Original	Waived
191.	MI	Wolverine Power Corporation, 85 FERC ¶ 61,065, 1998 WL 721606 (1998) (P. No. 10810-000)	Original	Waived
192.	ME	Otis Hydroelectric Company, 84 FERC ¶ 62,234, 1998 WL 631144 (1998) (P. No. 8277-008)	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
193.	ME	International Paper Company, 84 FERC ¶ 62,235, 1998 WL 631146 (1998) (P. No. 2375-013)	New	Yes
194.	MN	City of Thief River Falls Municipal Utilities, 84 FERC ¶ 62,233, 1998 WL 631142 (1998) (P. No. 11546-000)	Original	Yes
195.	ID	Idaho Water Resource Board, 84 FERC ¶ 61,146, 1998 WL 765455 (1998) (P. No. 10819-002)	Original	Yes
196.	WA	City of Tacoma, Washington, 84 FERC ¶ 61,107, 1998 WL 608611 (1998) (P. No. 460-001, -009)	Subsequent	Yes
197.	NE	Nebraska Public Power District, 84 FERC ¶ 61,078, 1998 WL 608590 (1998) (P. No. 1835-013)	New	Yes
198.	NE	Central Nebraska Public Power and Irrigation District, 84 FERC ¶ 61,079, 1998 WL 608591 (1998) (P. No. 1417-001)	New	Yes
199.	CA	Southern California Edison, 83 FERC ¶ 62,241, 1998 WL 319259 (1998) (P. No. 1930-014)	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
200.	MN	Minnesota Power and Light Company, Minnesota, 83 FERC ¶ 62,073, 1998 WL 292791 (1998) (P. No. 2663-004)	New	Yes
201.	ME	Bangor Hydro-Electric Company, 83 FERC ¶ 61,037, 1998 WL 292768 (1998) (P. No. 2534-005)	New	Yes
202.	ME	Bangor Hydro-Electric Company, 83 FERC ¶ 61,038, 1998 WL 292769 (1998) (P. No. 2712-004)	New	Yes
203.	ME	Bangor Hydro-Electric Company, 83 FERC ¶ 61,040, 1998 WL 292771 (1998) (P. No. 2403-006, 10981-000)	New	Yes
204.	ME	Central Maine Power Company, 82 FERC ¶ 61,187, 1998 WL 86787 (1998) (P. No. 2529-005)	New	Yes
205.	ME	Central Maine Power Company, 82 FERC ¶ 61,190, 1998 WL 86788 (1998) (P. No. 2527-002)	New	Yes
206.	AK	City of Saxman, Alaska, 82 FERC ¶ 62,041, 1998 WL 20036 (1998) (P. No. 11393-001)	Original	Waived

	State	Licensing Order	Type Of License	WQ Certification
207.	AK	Whitewater Engineering Corporation, Inc., 81 FERC ¶ 62,230, 1997 WL 790491 (1997) (P. No. 11243-002)	Original	Yes
208.	SC	City of Abbeville, 81 FERC ¶ 62,229, 1997 WL 790492 (1997) (P. No. 11286-000)	Original	Yes
209.	WY	Swift Creek Power Company, Inc., 81 FERC ¶ 61,347, 1997 WL 840790 (1997) (P. No. 1651-013)	New	Yes
210.	WA	Puget Sound Energy, Inc., 81 FERC ¶ 61,354, 1997 WL 840792 (1997) (P. No. 2494-002)	Original	Waived
211.	ME	Consolidated Hydro Maine, Inc., 81 FERC ¶ 62,172, 1997 WL 755606 (1997) (P. No. 11163-000)	Original	Yes
212.	ME	Central Maine Power Company, 81 FERC ¶ 61,249, 1997 WL 835137 (1997) (P. No. 2552-007)	Subsequent	Yes
213.	ME	Central Maine Power Company, 81 FERC ¶ 61,251, 1997 WL 835138 (1997) (P. No. 2325-007)	New	Yes
214.	WI	Town of Madison, Department of Electric Works, 81 FERC ¶ 61,252, 1997 WL 732416 (1997) (P. No. 11433-000)	Original	Yes

	State	Licensing Order	Type Of License	WQ Certification
215.	ME	Kennebec Water Power Company, 81 FERC ¶ 61,254, 1997 WL 835139 (1997) (P. No. 2671-002)	New	Yes
216.	ME	Central Maine Power Company, 81 FERC ¶ 61,256, 1997 WL 835140 (1997) (P. No. 2329-005)	New	Yes
217.	WI	N.E.W. Hydro, Inc. City of Oconto Falls, Wisconsin, 81 FERC ¶ 61,238, 1997 WL 723283 (1997) (P. No. 2523-007, 11496-000)	Subsequent	Waived
218.	CT	Summit Hydropower Putnam Hydropower Inc., 81 FERC ¶ 62,089, 1997 WL 663445 (1997) (P. No. 11547-000, 11501-000)	Original	Yes
219.	NY	Rochester Gas and Electric Corporation, 81 FERC ¶ 62,064, 1997 WL 833005 (1997) (P. No. 2584-003)	New	Yes
220.	UT	Monroe City Corporation, 80 FERC ¶ 62,193, 1997 WL 531252 (1997) (P. No. 1517-008)	New	Waived
221.	NY	Felts Mills Energy Partners, L.P., 80 FERC ¶ 61,075, 1997 WL 564546 (1997) (P. No. 4715-006)	Original	Yes

	State	Licensing Order	Type Of License	WQ Certification
222.	ME	Ridgewood Maine Hydro Partners, L.P., 80 FERC ¶ 62,038, 1997 WL 564557 (1997) (P. No. 11482-000)	Original	Yes
223.	WI	Wisconsin Valley Improvement Company, Tomahawk Power and Pulp Company, Wisconsin Public Service Corporation, Weyerhaeuser Company, Consolidated Water Power Company, Nekoosa Papers, Inc., 80 FERC ¶ 61,054, 1997 WL 404237 (1997) (P. No. 2113-041, 042, 047, 2239-009, 2476-003, 1999-006, 2212-003, 2590-004, 2256-004)	New	Waived
224.	NC	Hydro Matrix Partnership, Ltd, 79 FERC ¶ 62,213, 1997 WL 445907 (1997) (P. No. 11437-001)	Original	Yes
225.	WI	Wisconsin Public Service Corporation, 79 FERC ¶ 62,220, 1997 WL 457991 (1997) (P. No. 2581-002)	Subsequent	Waived
226.	MI	Upper Peninsula Power Company, 79 FERC ¶ 62,217, 1997 WL 619694 (1997) (P. No. 10856-002)	Original	Waived
227.	IL	Southwestern Electric Cooperative, Inc., 79 FERC ¶ 62,214, 1997 WL 449932 (1997) (P. No. 11214-001)	Original	Waived

	State	Licensing Order	Type Of License	WQ Certification
228.	WI	Wisconsin Public Service Corporation, 79 FERC ¶ 62,218, 1997 WL 457989 (1997) (P. No. 2560-001)	Subsequent	Yes
229.	WI	Wisconsin Public Service Corporation, 79 FERC ¶ 62,219, 1997 WL 457990 (1997) (P. No. 2525-004)	New	Waived
230.	WI	Wisconsin Public Service Corporation, 79 FERC ¶ 62,222, 1997 WL 457994 (1997) (P. No. 2522-002)	New	Waived
231.	WI	Wisconsin Public Service Corporation, 79 FERC ¶ 62,223, 1997 WL 457995 (1997) (P. No. 2595-005)	New	Waived
232.	WI	Wisconsin Public Service Corporation, 79 FERC ¶ 62,221, 1997 WL 457992 (1997) (P. No. 2546-001)	New	Waived
233.	IN	Star Mill, Inc., 79 FERC ¶ 62,211, 1997 WL 445906 (1997) (P. No. 11291-001)	Original	Yes
234.	NV	Blue Diamond South Pumped Storage Power Company, Inc. and Blue Diamond Power Partners Limited Partnership, 79 FERC ¶ 62,184, 1997 WL 445868 (1997) (P. No. 10756-001)	Original	Waived

	State	Licensing Order	Type Of License	WQ Certification
235.	MT	Continental Hydro Corporation, 79 FERC ¶ 61,292, 1997 WL 438899 (1997) (P. No. 3574-004)	Original	Waived
236.	WI	Wisconsin Power and Light Company, 79 FERC ¶ 61,181, 1997 WL 254324 (1997) (P. No. 710-000)	New	Waived
237.	WI	Midwest Hydraulic Company, Inc., 79 FERC ¶ 62,101, 1997 WL 230213 (1997) (P. No. 10805-002)	Original	Yes
238.	CO	Public Service Company of Colorado, 79 FERC ¶ 61,148, 1997 WL 230203 (1997) (P. No. 2275-001)	Subsequent	Yes
239.	WI	Wisconsin Public Service Corporation, 79 FERC ¶ 62,098, 1997 WL 375650 (1997) (P. No. 2433-004)	New	Waived
240.	WI	Niagara of Wisconsin Paper Corporation, 79 FERC ¶ 62,095, 1997 WL 233924 (1997) (P. No. 2536-009)	New	Waived
241.	WI	Wisconsin Electric Power Company, 79 FERC ¶ 62,096, 1997 WL 375648 (1997) (P. No. 2357-003)	New	Yes
242.	WI	Wisconsin Electric Power Company, 79 FERC ¶ 62,097, 1997 WL 375649 (1997) (P. No. 2394-006)	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
243.	MA	Western Massachusetts Electric Company, 79 FERC ¶ 61,007, 1997 WL 164332 (1997) (P. No. 2334-001)	New	Yes
244.	VT, MA	New England Power Company, 79 FERC ¶ 61,006, 1997 WL 164333 (1997) (P. No. 2323-012)	New	Yes
245.	OR	Eugene Water & Electric Board, 78 FERC ¶ 62,207, 1997 WL 129430 (1997) (P. No. 2496-002)	New	Waived
246.	WA	City of Tacoma, Washington, 78 FERC ¶ 62,170, 1997 WL 340217 (1997) (P. No. 1862-009)	New	Yes
247.	WA	City of Centralia Light Department, 78 FERC ¶ 62,171, 1997 WL 99829 (1997) (P. No. 10703-001)	Original	Yes
248.	NY	Seneca Falls Power Corporation, 78 FERC ¶ 62,113, 1997 WL 61518 (1997) (P. No. 2438-007)	New	Yes
249.	WA	Seattle City Light, 78 FERC ¶ 62,097, 1997 WL 48326 (1997) (P. No. 2705-003)	New	Yes
250.	MI	Upper Peninsula Power Company, 78 FERC ¶ 62,100, 1997 WL 276525 (1997) (P. No. 10854-002)	Original	Waived

	State	Licensing Order	Type Of License	WQ Certification
251.	WI	Fraser Papers, Inc., 78 FERC ¶ 62,083, 1997 WL 45991 (1997) (P. No. 2395-003)	Subsequent	Waived
252.	WI	Fraser Papers, Inc., 78 FERC ¶ 62,082, 1997 WL 45992 (1997) (P. No. 2421-003)	Subsequent	Waived
253.	WI	Fraser Papers, Inc., 78 FERC ¶ 62,084, 1997 WL 45993 (1997) (P. No. 2473-002)	Subsequent	Waived
254.	WI	Northern States Power Company of Wisconsin, 78 FERC ¶ 62,087, 1997 WL 45990 (1997) (P. No. 2390-003)	New	Waived
255.	WI	Northern States Power Company of Wisconsin, 78 FERC ¶ 62,086, 1997 WL 45994 (1997) (P. No. 2475-006)	Subsequent	Waived
256.	WI	Fraser Papers, Inc., 78 FERC ¶ 62,085, 1997 WL 45997 (1997) (P. No. 2640-010)	Subsequent	Waived
257.	CA	Southern California Edison Company, 78 FERC ¶ 61,110, 1997 WL 43876 (1997) (P. No. 1388-001)	New	Waived

	State	Licensing Order	Type Of License	WQ Certification
258.	CA	Southern California Edison Company, 78 FERC ¶ 61,109, 1997 WL 43877 (1997) (P. No. 1389-001)	New	Waived
259.	MI	Indiana Michigan Power Company, 77 FERC ¶ 62,207, 1996 WL 768589 (1996) (P. No. 2551-004)	New	Waived
260.	IA	Mitchell County Conservation Board, 77 FERC ¶ 62,202, 1996 WL 879343 (1996) (P. No. 11530-000)	Original	Yes
261.	WI	N.E.W. Hydro, Inc., 77 FERC ¶ 62,200, 1996 WL 879341 (1996) (P. No. 2550-002)	Subsequent	Waived
262.	ME	Ridgewood Maine Hydro Partners, L.P, 77 FERC ¶ 62,201, 1996 WL 879342 (1996) (P. No. 11132-000)	Original	Yes
263.	NY	Beebee Island Corporation, 77 FERC ¶ 61,305, 1996 WL 859373 (1996) (P. No. 2538-001)	New	Yes
264.	NY	Niagara Mohawk Power Corporation, 77 FERC ¶ 61,306, 1996 WL 876071 (1996) (P. No. 2569-004)	New	Yes
265.	CA	Southern California Edison Company, 77 FERC ¶ 61,313, 1996 WL 876078 (1996) (P. No. 2290-006)	New	Yes

	State	Licensing Order	Type Of License	WQ Certification
266.	ID	Indiana Michigan Power Company, 77 FERC ¶ 62,183, 1996 WL 876092 (1996) (P. No. 2579-010)	New	Waived
267.	ME	Great Northern Paper, Inc., 77 FERC ¶ 61,066, 1996 WL 605218 (1996) (P. No. 2572-005)	New	Yes
268.	ME	Great Northern Paper, Inc., 77 FERC ¶ 61,068, 1996 WL 808134 (1996) (P. No. 2458-009)	New	Yes
269.	SC	Georgia Power Company, 77 FERC ¶ 62,002, 1996 WL 560790 (1996) (P. No. 2354-018)	New	Yes
270.	WA	Public Utility District No. 1 of Okanogan County, Washington, 76 FERC ¶ 61,271, 1996 WL 521436 (1996) (P. No. 10536-001)	Original	Yes
271.	NY	Niagara Mohawk Power Corporation, 76 FERC ¶ 61,152, 1996 WL 436594 (1996) (P. No. 2645-029)	New	Yes
272.	WI	Consolidated Water Power Company, 76 FERC ¶ 61,049, 1996 WL 404055 (1996) (P. No. 2590-001)	New	Waived
273.	WI	Wisconsin Valley Improvement Company, 76 FERC ¶ 61,050, 1996 WL 404056 (1996) (P. No. 2113-022)	New	Waived

	State	Licensing Order	Type Of License	WQ Certification
274.	WI	Nekoosa Papers, Inc., 76 FERC ¶ 61,051, 1996 WL 404057 (1996) (P. No. 2292-001)	New	Waived
275.	WI	Nekoosa Papers, Inc., 76 FERC ¶ 61,052, 1996 WL 404049 (1996) (P. No. 2291-001)	New	Waived
276.	WI	Nekoosa Papers, Inc., 76 FERC ¶ 61,053, 1996 WL 411923 (1996) (P. No. 2255-003)	New	Waived
277.	WI	Tomahawk Power and Pulp Company, 76 FERC ¶ 61,055, 1996 WL 404058 (1996) (P. No. 2239-004)	New	Waived
278.	WI	Weyerhaeuser Company, 76 FERC ¶ 61,057, 1996 WL 404050 (1996) (P. No. 2212-001)	New	Waived
279.	WI	Wisconsin Public Service Corporation, 76 FERC ¶ 61,058, 1996 WL 411922 (1996) (P. No. 2476-001)	Subsequent	Waived
280.	WI	Consolidated Water Power Company, 76 FERC ¶ 61,059, 1996 WL 404051 (1996) (P. No. 2256-001)	New	Waived
281.	WI	Wisconsin Public Service Corporation, 76 FERC ¶ 61,056, 1996 WL 404048 (1996) (P. No. 1999-004)	New	Waived

	State	Licensing Order	Type Of License	WQ Certification
282.	AK	Alaska Power and Telephone Company, 76 FERC ¶ 62,032, 1996 WL 401612 (1996) (P. No. 11077-001)	Original	Waived
283.	SC	South Carolina Electric & Gas Company, 75 FERC ¶ 61,308, 1996 WL 331236 (1996) (P. No. 2315-002)	New	Yes
284.	SC	Duke Power Company, 75 FERC ¶ 61,307, 1996 WL 331235 (1996) (P. No. 2331-002)	New	Yes
285.	SC, NC	Duke Power Company, 75 FERC ¶ 61,267, 1996 WL 323743 (1996) (P. No. 2332-003)	New	Yes
286.	NH	Public Service Company of New Hampshire, 75 FERC ¶ 61,111, 1996 WL 208844 (1996) (P. No. 2456-009)	New	Waived
287.	GA	Georgia Power Company, 74 FERC ¶ 62,146, 1996 WL 157949 (1996) (P. No. 1951-037)	New	Yes
288.	NY	Niagara Mohawk Power Company, 74 FERC ¶ 62,138, 1996 WL 127293 (1996) (P. No. 5984-000)	Original	Waived

	State	Licensing Order	Type Of License	WQ Certification
289.	CO	Public Service Company of Colorado, 74 FERC ¶ 62,097, 1996 WL 745106 (1996) (P. No. 2187-002)	Subsequent	Yes
290.	NY	Rochester Gas and Electric Corporation, 74 FERC ¶ 62,091, 1996 WL 108383 (1996) (P. No. 2583-004)	New	Yes
291.	NY	Rochester Gas and Electric Corporation, 74 FERC ¶ 62,090, 1996 WL 118603 (1996) (P. No. 2582-002)	New	Yes
292.	NY	Niagara Mohawk Power Corporation, 74 FERC ¶ 62,087, 1996 WL 92718 (1996) (P. No. 11408-000)	Original	Yes
293.	WI	Wisconsin Electric Power Company, 73 FERC ¶ 61,346, 1995 WL 752015 (1995) (P. No. 2486-002)	New	Waived
294.	SC	Duke Power Company, 73 FERC ¶ 61,330, 1995 WL 902458 (1995) (P. No. 2406)	New	Yes
295.	SC	Duke Power Company, 73 FERC ¶ 61,335, 1995 WL 902463 (1995) (P. No. 2465)	New	Yes
296.	SC	Greenwood County, South Carolina, 73 FERC ¶ 61,336, 1995 WL 902464 (1995) (P. No. 1267)	New	Yes

APPENDIX C

Project Licenses Expiring between January 1, 2006 and January 1, 2016

	State	Licensee	Project Name	Project	Expiration Date
1	NC	Duke Power	West Fork	02686	31-Jan-06
2.	NC	Duke Power	East Fork	02698	31-Jan-06
3	MO	Union Electric Company	Osage	00459	28-Feb-06
4.	NC	Duke Power	Nantahala	02692	28-Feb-06
5.	OR	Pacificorp	Klamath	02082	28-Feb-06
6	SC	South Carolina Public Service Authority	Santee-Cooper	00199	31-Mar-06
7.	NY	New York State Electric & Gas	Saranac River	02738	12-Apr-06
8.	WA	Pacificorp	Merwin	00935	30-Apr-06
9.	WA	Pacificorp	Swift No. 1	02111	30-Apr-06
10.	WA	Puget Sound Energy	Baker	02150	30-Apr-06
11.	WA	PUD No. 1 of Cowlitz County	Swift No. 2	02213	30-Apr-06
12.	WA	PUD No. 1 of Chelan County	Rocky Reach	02145	30-Jun-06
13.	OR	Portland General Electric Company	Clackamas River	02195	31-Aug-06
14.	NY	New York State Electric & Gas	Keuka	02852	30-Nov-06
15.	NY	Erie Boulevard Hydropower	Macomb	07321	30-Nov-06
16.	CO	City & County Of Denver	Williams Fork	02204	31-Dec-06
17	CA	California Department Of Water	Feather River	02100	31-Jan-07
18.	MA	City of Holyoke	Holyoke No. 4	07758	28-Feb-07
19.	CA	Pacific Gas and Electric Company	Kilarc - Cow Creek	00606	27-Mar-07
20.	WI	Flambeau Hydro	Clam River	09185	31-Mar-07
21.	AK	Chugach Electric Association	Cooper Lake	02170	30-Apr-07
22	UT	Garkane Power Association	Boulder Creek	02219	30-Apr-07
23.	WI	Flambeau Hydro	Danbury Dam	09184	9-Jun-07
24.	AL	Alabama Power Company	Mitchell	00082	31-Jul-07
25.	AL	Alabama Power Company	Jordan Dam	00618	31-Jul-07
26.	AL	Alabama Power Company	Coosa River	02146	31-Jul-07
27.	CA	Sacramento Municipal Utility District	Upper American	02101	31-Jul-07
28.	CA	Pacific Gas and Electric Company	Chili Bar	02155	31-Jul-07
29.	WA	Avista Corporation	Spokane River	02545	1-Aug-07
30.	AK	Alaska Power & Telephone Company	Skagway-Dewey	01051	29-Aug-07
31.	AL	Alabama Power Company	John H. Bankhead	02165	31-Aug-07
32.	NY	New York Power Authority	Robert Moses-	02216	31-Aug-07
33.	CA	Southern California Edison Company	Mammoth Pool	02085	30-Nov-07

	State	Licensee	Project Name	Project	Expiration Date
34.	MI	Synex-Michigan	Sanford	02785	30-Nov-07
35.	AK	City & Borough of Sitka	Blue Lake	02230	31-Mar-08
36.	IA	City of Ottumwa	Ottumwa	00925	30-Apr-08
37.	NC	Alcoa Power Generating	Yadkin	02197	30-Apr-08
38.	NC	Progress Energy Carolinas	Yadkin-Pee Dee	02206	30-Apr-08
39.	UT	Hyrum City Corporation	Hyrum	00946	30-Apr-08
40.	VA	Virginia Electric & Power Company	Cushaw	00906	15-Jun-08
41.	GA	Crisp County Power Commission	Lake Blackshear	00659	9-Aug-08
42.	NC	Duke Power	Catawba-Wateree	02232	31-Aug-08
43.	WA	PUD No. 1 of Pend Oreille County	Sullivan Lake	02225	30-Sep-08
44.	OR	City of Eugene	Carmen-Smith	02242	30-Nov-08
45.	CA	Southern California Edison Company	Big Creek No. 2a	00067	28-Feb-09
46.	CA	Southern California Edison Company	Big Creek No. 3	00120	28-Feb-09
47.	CA	Southern California Edison Company	Big Creek No.1 & No.	02175	28-Feb-09
48.	GA	Georgia Power Company	Morgan Falls	02237	28-Feb-09
49.	GA	Eagle & Phoenix Hydro Company	Eagle & Phoenix	02655	28-Feb-09
50.	CA	South Feather Water And Power Agency	South Feather Power	02088	31-Mar-09
51.	GA	Augusta Canal Authority	John P. King Mill	09988	31-May-09
52.	NH	Public Service Company of New	Canaan	07528	31-Jul-09
53.	CO	City of Boulder	Boulder Canyon	01005	31-Aug-09
54.	CA	Pacific Gas and Electric Company	Desabla-Centerville	00803	11-Oct-09
55.	MA	Littleville Power Company	Glendale	02801	31-Oct-09
56.	CA	Moss Richard	Cinnamon Ranch	06885	31-Dec-09
57.	MT	PP&L Montana	Mystic Lake	02301	31-Dec-09
58.	MT	Clark Fork and Blackfoot	Milltown	02543	31-Dec-09
59.	WA	Energy Northwest	Packwood Lake	02244	28-Feb-10
60.	VA	Appalachian Power Company	Smith Mountain	02210	31-Mar-10
61.	MI	Consumers Energy Company	Calkins Bridge	00785	10-Apr-10
62.	CO	Jacobson Eric R.	Ouray	00733	12-Apr-10
63.	CA	Willis Ken	Fire Mountain	01992	30-Apr-10
64.	CO	Public Service Company of Colorado	Tacoma-Ames	00400	30-Jun-10
65.	ID	Idaho Power Company	Swan Falls	00503	30-Jun-10
66.	MO	Union Electric Company	Taum Sauk	02277	30-Jun-10
67.	WI	City of Kaukauna	Badger-Rapide	02677	11-Aug-10
68.	SC	South Carolina Electric & Gas Company	Saluda	00516	31-Aug-10
69.	ID	Mackay Bar Corporation	Hettinger	03041	31-Oct-10
70.	NY	Green Island Power Authority	Green Island	00013	2-Mar-11

	State	Licensee	Project Name	Project	Expiration Date
71.	IN	PSI Energy	Markland	02211	30-Apr-11
72.	MA	Mead Paper Corporation	Willow Mill	02985	30-Apr-11
73.	WA	PUD No. 1 of Snohomish County	Henry M Jackson	02157	31-May-11
74.	VA	Appalachian Power Company	Claytor	00739	30-Jun-11
75.	CA	Pacific Gas and Electric Company	Mccloud-Pit	02106	31-Jul-11
76.	WA	City of Seattle	Boundary	02144	30-Sep-11
77.	MT	Northern Lights	Lake Creek	02594	30-Nov-11
78.	SC	Milliken & Company	Pacolet	02621	31-Jan-12
79.	ME	FPL Energy Maine Hydro	Brassua	02615	31-Mar-12
80	NY	Celtu Tissue Corporation	Natural Dam	02851	31-Mar-12
81.	VT	Omya	Otter Creek	02558	31-Mar-12
82.	NY	Hampshire Paper Company	Emeryville	02850	31-May-12
83.	WA	PUD No. 1 of Douglas County	Wells	02149	31-May-12
84.	CT	Northeast Generation Company	Scotland	02662	31-Aug-12
85.	SC	Inman Mills	Riverdale	04362	31-Aug-12
86	AZ	Salt River Project Agricultural Improvement and Power District	Blue Ridge	02304	31-Dec-12
87.	NY	Erie Boulevard Hydropower	Oswegatchie River	02713	31-Dec-12
88.	CA	Placer County Water Agency	Middle Fork	02079	28-Feb-13
89	NJ	Jersey Central Power & Light Company	Yards Creek	02309	28-Feb-13
90.	CA	Nevada Irrigation District	Yuba-Bear	02266	30-Apr-13
91.	CA	Pacific Gas and Electric Company	Drum-Spaulding	02310	30-Apr-13
92.	AL	Alabama Power Company	Martin Dam	00349	8-Jun-13
93.	TX	Sabine River Authority	Toledo Bend	02305	30-Sep-13
94.	WV	Appalachian Power Company	London/Marmet	01175	31-Jan-14
95.	WV	Appalachian Power Company	Winfield	01290	31-Jan-14
96.	CA	Merced Irrigation District	Mcswain & New	02179	28-Feb-14
97.	CA	Pacific Gas and Electric Company	Merced Falls	02467	28-Feb-14
98.	CO	Public Service Company of Colorado	Cabin Creek	02351	28-Feb-14
99	NE	Loup River Public Power District	Loup Canal	01256	15-Apr-14
100.	NH	Monadnock Paper Mills	Monadnock Paper	06597	31-Jul-14
101.	MI	City of Traverse	Brown Bridge	02978	31-Aug-14
102.	PA	Exelon Generating Company	Muddy Run	02355	31-Aug-14
103.	PA	Philadelphia Electric Power Company	Conowingo	00405	1-Sep-14
104.	PA	PPL Holtwood	Holtwood	01881	1-Sep-14
105.	PA	York Haven Power Company	York Haven	01888	1-Sep-14
106.	GA	Georgia Power Company	Bartletts Ferry	00485	14-Dec-14

	State	Licensee	Project Name	Project	Expiration Date
107.	MI	Antrim County	Elk Rapids	03030	31-Dec-14
108	WI	N.E.W. Hydro	Menominee & Park	02744	28-Feb-15
109.	NC	Bynum Hydro Company	Bynum Dam	04093	30-Apr-15
110	VT	Village of Morrisville	Morrisville	02629	30-Apr-15
111.	NY	Erie Boulevard Hydropower	Chasm	07320	30-Jun-15
112.	WI	Village of Gresham	Weed Dam	02464	30-Jun-15
113.	AL	Alabama Power Company	Holt Lock And Dam	02203	31-Aug-15
114.	NY	Erie Boulevard Hydropower	Hogansburg	07518	30-Sep-15
115.	OK	Grand River Dam Authority	Salina	02524	30-Nov-15
116.	PA	First Energy Generation Corporation	Kinzua	02280	30-Nov-15
117.	OR	Pacificorp	Wallowa Falls	00308	28-Feb-16
118.	ME	Domtar Maine Corporation	Vanceboro (Storage)	02492	1-Mar-16
119.	CO	City Of Loveland	Loveland	02829	8-Mar-16
120.	CA	Yuba County Water Agency	Yuba River	02246	31-Mar-16
121.	CA	Turlock Irrigation District	New Don Pedro	02299	30-Apr-16
122	SC	Clifton Power Corporation	Clifton Mills No 1	04632	31-May-16
123.	NC	Duke Power	Keowee & Jocassee	02503	31-Aug-16
124	NC	Ward Ray F.	Ward Mill Dam	09842	31-Aug-16
125	WI	Wisconsin Public Service Corporation	Tomahawk	01940	31-Dec-16

Supreme Court, U.S.
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No. 04-1527

IN THE

Supreme Court of the United States

S.D. WARREN COMPANY,
Petitioner,

v.

BOARD OF ENVIRONMENTAL PROTECTION,
Respondent.

On Writ of Certiorari to the Maine Supreme Judicial Court

BRIEF OF THE WESTERN URBAN WATER COALITION AS *AMICUS CURIAE*

BENJAMIN S. SHARP
Counsel of Record
GUY R. MARTIN
SLOANE ANDERS WILDMAN
AARON C. COURTNEY
KAREN M. MCGAFFEY
PERKINS COIE LLP
607 Fourteenth Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 628-6600

Counsel for Amicus Curiae

November 23, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
A. Dams, diversions and water conveyances do not currently require section 402 permits	4
B. Facilities subject to section 401's certification requirement are not necessarily subject to section 402 permitting requirements	7
1. A plain reading of sections 401 and 402 reveals significant differences between the applicability of these regulatory requirements	7
2. Sections 401 and 402 serve different purposes	9
CONCLUSION	13

TABLE OF AUTHORITIES

CASES — Page

Alabama Rivers Alliance v. Fed. Energy Regulatory Comm'n, 325 F.3d 290 (D.C. Cir. 2003) 7

Envtl. Prot. Agency v. California ex rel State Water Res. Control Bd., 426 U.S. 200 (1976) ... 10

Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988) 4

Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 4, 11

North Carolina v. Fed. Energy Regulatory Comm'n, 112 F.3d 1175 (D.C. Cir. 1997) 8

Oregon Natural Desert Ass'n v. Dombeck, 172 F.3d 1092 (9th Cir. 1998) 8

Pronsolino v. Nastri, 291 F.3d 1123 (9th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003) 11

S.D. Warren Co. v. Bd. of Envtl. Prot., 868 A.2d 210 (Me. 2005) 2

S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95 (2004), *reh'g denied*, 541 U.S. 1057 (2004) 4, 5

Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency, 399 F.3d 486 (2d Cir 2005) 7

STATUTES

33 U.S.C. § 1251 ..... 6, 12

33 U.S.C. § 1311 4

33 U.S.C. § 1323 10

33 U.S.C. § 1341 ..... 2, 7

33 U.S.C. § 1342 ..... 2, 4, 7, 9

33 U.S.C. § 1344 9

33 U.S.C. § 1362 8

33 U.S.C. § 1370 ..... 6, 12

TABLE OF AUTHORITIES—Continued

	Page
Federal Water Pollution Control Act, Pub. L. No. 92-500, § 2, 86 Stat. 880 (1972)	11
Water and Environmental Quality Improvement Act of 1970, Pub. L. No. 91-224, § 103, 84 Stat. 91 (1970)	9, 10
OTHER AUTHORITIES	
Conf. Rep. No. 91-940 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2712	9
H.R. Rep. No. 92-911 (1972), *reprinted in* 1 Congressional Research Service, A Legislative History of the Water Pollution Control Act Amendments of 1972 (1973)	10, 11
Memorandum from EPA General Counsel Ann R. Klee and Assistant Adm'r for Water Benjamin H. Grumbles, *Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers*	5
S. Rep. No. 92-414 (1971), *reprinted in* 2 Congressional Research Service, A Legislative History of the Water Pollution Control Act Amendments of 1972 (1973)	11
S. Rep. No. 95-370 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4366	11

IN THE

Supreme Court of the United States

No. 04-1527

S.D. WARREN COMPANY,
Petitioner,

v.

BOARD OF ENVIRONMENTAL PROTECTION,
Respondent.

On Writ of Certiorari to the Maine Supreme Judicial Court

BRIEF OF THE WESTERN URBAN WATER COALITION AS *AMICUS CURIAE*

In accordance with the Court's Rule 37, the Western Urban Water Coalition ("WUWC") has received written consents of counsel for the parties to file this brief as *amicus curiae.* Copies of the written consents have been filed with the clerk.

INTEREST OF *AMICUS CURIAE*

WUWC is a national association of municipal water utilities that serve most of the largest cities in the western United States. The charter of WUWC members is to provide a reliable, high-quality urban water supply for present and future water users. Urban water supplies must be adequate to accommodate rapid regional growth, sustain people, and maintain and build the economy, while protecting and enhancing environmental values. WUWC members currently

serve over 31 million urban water consumers in Arizona, California, Colorado, Nevada, Utah and Washington.[1]

Members of WUWC own and operate water supply projects. These projects consist of water conduits, reservoirs, hydroelectric facilities, power houses, transmission lines and other facilities involved in water supply and water transfer. These facilities are essential to the ability of WUWC members to fulfill their mission of serving the water resource-related needs of the majority of the population of the western states.

If the Court upholds the decision of the Maine Supreme Judicial Court in *S.D. Warren Co. v. Bd. of Envtl. Prot.*, 868 A.2d 210 (Me. 2005), it could result in the WUWC members being required to obtain additional certifications for new developments or facilities pursuant to section 401 of the Clean Water Act, 33 U.S.C. § 1341. More significantly, however, WUWC members are concerned that the resolution of this case, through some statutory construction of section 401, might also be applied to 402 of the Clean Water Act, *Id.* at § 1342, in a manner that disrupts existing law regarding the National Pollutant Discharge Elimination System ("NPDES") permitting requirements found in section 402. WUWC members operate hundreds of dams and water diversion and conveyance facilities that are needed to deliver public water supplies to urban areas throughout the western United States. These facilities have never been required to obtain NPDES

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[1] WUWC represents the following urban water utilities: Arizona—Central Arizona Project, City of Phoenix, City of Tucson; California—East Bay Municipal Utility District, Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utilities Commission, Santa Clara Valley Water District; Colorado—Denver Water Department, City of Aurora; Nevada—Las Vegas Valley Water District, Southern Nevada Water Authority, Truckee Meadows Water Authority; Utah—Central Utah Water Conservancy District; and Washington—Seattle Public Utilities, City of Seattle.

permits for the movement of water. Requiring NPDES permits would unnecessarily and inappropriately interfere with other regulatory requirements, and would have serious economic and operational consequences to the provision of essential water supplies.

SUMMARY OF ARGUMENT

The position WUWC is advocating as *amicus* is simple: This case concerns section 401 only and does not pertain to the Clean Water Act's section 402 permitting requirements. WUWC believes that grounds exist, some of which are briefed by other parties, to reverse the Maine court's holding regarding the section 401 issue presented to the Court. However, WUWC notes that, as described below, there are important differences between the language, origins and purposes of sections 401 and 402. Section 401 was enacted to ensure that the construction and operation of projects that require federal licenses or permits and that may result in a discharge do not cause a violation of applicable provisions of state water quality law. Congress designed section 402, on the other hand, to regulate point source discharges of pollutants to navigable waters. Both section 401 and section 402 employ the common term "discharge," but "discharge" is not and should not be defined in the same way in both provisions. Consequently, activities that are subject to section 401's certification requirement are not necessarily subject to section 402's permitting requirement. Resolution of this case in a manner that defines "discharge" in the same way for both provisions could have the unintended and significant consequence of imposing section 402 permitting requirements on water transfer and diversion activities.

ARGUMENT

A. Dams, diversions and water conveyances do not currently require section 402 permits.

The Clean Water Act prohibits the discharge of pollutants unless authorized pursuant to the Act. 33 U.S.C. § 1311; *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 102 (2004), *reh'g denied*, 541 U.S. 1057 (2004). The primary way in which discharges are authorized under the Act is through section 402's NPDES permitting program. To this end, section 402 "requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *Miccosukee*, 541 U.S. at 102. Either the Environmental Protection Agency ("EPA") or state agencies that have developed EPA-approved permitting programs issue NPDES permits. 33 U.S.C. § 1342(a)(1). NPDES permits contain technology-based effluent limitations as well as limitations designed to ensure compliance with state-adopted water quality standards. *Id.*

According to EPA's long-standing interpretation of the Clean Water Act, operators of dams and hydroelectric facilities are not required to obtain NPDES permits under section 402, unless these facilities introduce grease, oil or other pollutants to the water that passes through or over the facilities. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). The courts of appeals for both the Sixth and District of Columbia Circuits consistently have upheld EPA's interpretation. *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 581 (6th Cir. 1988); *Gorsuch*, 693 F.2d at 167.

Last term, in *Miccosukee*, 541 U.S. 95, the Court considered the related question of whether water diversion and conveyance facilities are required to obtain section 402 NPDES permits. Although the Court did not resolve the broad question whether section 402 permits may ever be required for a water diversion or conveyance facility, the

Court did hold that a permit was not required for facilities that merely convey water from one portion of a waterbody to another portion of the same waterbody. *Id.* at 112.

Since the Court's decision in *Miccosukee*, EPA has formally articulated its interpretation of section 402's permitting requirement with respect to water diversions and conveyances. *See* Memorandum from EPA General Counsel Ann R. Klee and Assistant Adm'r for Water Benjamin H. Grumbles, *Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers*, *available at* http://www.epa.gov/ogc/documents/water_transfers.pdf. According to EPA, the mere transfer of water does not constitute a discharge of pollutants subjecting the activity to permitting under section 402 the Clean Water Act, even if the water is transferred from one water body to another. *Id.* at 2-3, 18, n.18. This formal interpretation confirmed EPA's long-standing practice, and is consistent with the earlier circuit court decisions involving dams. *Id.* at 2-3, 9, 19. EPA further has indicated its intention to undertake a rulemaking to adopt regulations consistent with this formal interpretation. *Id.* at 3, 19.

EPA's long-standing interpretation and practice, taken together with the Court's decision in *Miccosukee* and prior circuit court decisions concerning dams, confirm that hydroelectric, diversion or conveyance facilities need not obtain NPDES permits under Clean Water Act section 402 for mere water movement.

WUWC believes that this legal interpretation is correct and has tremendous practical importance. Tens of thousands of dams, reservoirs, canals, tunnels, ditches and pipelines are used to convey water in the United States. Particularly in the western United States, many large diversion projects are required to deliver water to urban and agricultural places of use and, in many cases, precipitation falls as snow and must

be captured and stored for future use. Requiring NPDES permits to authorize the continued use of these facilities would have dire economic and operational implications.

The process of obtaining NPDES permits is time-consuming and costly for both the permitting agencies and applicants. The need to issue thousands of new permits would overwhelm permitting agencies that already suffer from significant permitting backlogs. Before permits could be issued, regulators would have to develop permitting conditions appropriate for water conveyance facilities that are very different from the industrial and waste water discharge facilities currently regulated under the NPDES program. Once developed, permitting requirements could be costly. In fact, given the volume of water conveyed in many of these facilities, any sort of water quality treatment likely would be impractical or infeasible.

Applying the NPDES permitting requirements might also fundamentally alter long-established allocations of water and the ability to utilize water rights granted under state law. The historic federal/state balance over land and water use would be fundamentally altered without any clear Congressional directive to do so. Sections 101(b), (g) and 510 of the Clean Water Act specifically preserve state authority to allocate water. 33 U.S.C. §§ 1251(b), (g); 1370(2).

The significant consequences of extending section 402's permitting requirement to these types of facilities have not been considered in the record before the Court. However, because section 401 and section 402 share the term "discharge," a ruling in this case that affects the interpretation of the term "discharge" could subject water transfer and diversion activities to NPDES permitting in the future.

B. Facilities subject to section 401's certification requirement are not necessarily subject to section 402 permitting requirements.

In addition to the precedential and practical reasons discussed above, the differences between the language and purposes of sections 401 and section 402 also counsel against imposing a common definition in this case. The case before the Court concerns the applicability of the state certification requirement found in section 401 of the Act only.

1. *A plain reading of sections 401 and 402 reveals significant differences between the applicability of these regulatory requirements.*

Section 401 provides that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate." 33 U.S.C. § 1341(a)(1). "The required certification must provide that such discharge will comply with . . . applicable water quality standards . . . as well as with 'any other appropriate requirement of state law.'" *Alabama Rivers Alliance v. Fed. Energy Regulatory Comm'n*, 325 F.3d 290, 293 (D.C. Cir. 2003) (quoting 33 U.S.C. § 1341(d)). This certification requirement differs from section 402's permit requirement in key respects.

Section 401's certification requirements are triggered by activities that "*may* result in any discharge." 33 U.S.C. § 1341(a)(1) (emphasis added). Section 402, however, requires a permit only for actual discharges. *See* 33 U.S.C. § 1342(a)(1). *See also Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency*, 399 F.3d 486, 505 (2d Cir. 2005) (section 402 "gives the EPA jurisdiction to regulate and control only *actual* discharges—not potential discharges, and certainly not point sources themselves." (emphasis in original)).

Furthermore, section 401 uses the term "discharge" without qualification, whereas section 402 requires a permit only for the "discharge of pollutants." The Act does not provide a definition of "discharge." Instead, it states that "[t]he term 'discharge' when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16) (emphasis added). Conversely, the Act provides a detailed definition of "discharge of a pollutant" as that term is used in connection with the section 402 permitting program:

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source [and] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

Id. at. § 1362(12). "Discharge" when used alone thus encompasses, but is broader than, a "discharge of pollutants." Therefore, although discharges of pollutants that require a permit under section 402 may also be discharges for purposes of section 401, these definitions plainly indicate that some activities that constitute a "discharge" requiring section 401 certification do not constitute a "discharge of pollutants" requiring a section 402 permit.

Moreover, the courts of appeals consistently have recognized differences in the scope of sections 401 and 402. In *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998), the Ninth Circuit explained that the term "discharge" used in section 401 "is the broader term because it includes all releases from point sources, whether polluting or nonpolluting." Similarly, in *North Carolina v. Federal Energy Regulatory Comm'n*, 112 F.3d 1175, 1187 (D.C. Cir. 1997), the District of Columbia Circuit acknowledged that section 402's permitting program has a much narrower focus "on the regulation of pollutants" as opposed

to "the general regulation of project discharges" implemented by section 401.

Indeed, Congress' inclusion of the term "discharge" elsewhere in the Clean Water Act reflects the broader scope of the term when used alone. Specifically, throughout other portions of section 402 and the Act, Congress consistently qualified its use of the term "discharge," thereby indicating a clear recognition that when used unconditionally, as in section 401, "discharge" has a generalized, broad meaning. *See, e.g.*, 33 U.S.C. § 1342(a)(4), (5) (referencing permits for discharges "under section 407" (refuse pollution from floating vessels)); 33 U.S.C. § 1342(b)(8) (referencing permits for a "discharge from a publicly owned treatment works"); 33 U.S.C. § 1342(l)(1) (exempting "discharges composed entirely of return flows from irrigated agriculture"); 33 U.S.C. § 1342(l)(2) (exempting "discharges of stormwater runoff from mining operations or oil and gas . . . operations"); 33 U.S.C. § 1344 (creating permit program for the "discharge of dredged or fill material").

2. *Sections 401 and 402 serve different purposes.*

In addition to the significant differences in their language, section 401 and section 402 serve different purposes. Congress enacted these provisions at different times and for very different reasons.

Section 401's certification requirement pre-dated the Clean Water Act.[2] Congress originally enacted the certification requirement as part of the Water and Environmental Quality Improvement Act of 1970, Pub. L. No. 91-224, § 103, 84 Stat. 91 (1970); *see also* Conf. Rep. No. 91-940 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2712, 2740-41. The 1970 Act amended the Refuse Act to require all federal facilities to

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[2] When promulgated in 1972, the Clean Water Act was known as the Federal Water Pollution Control Act.

comply with water quality standards adopted by states, a requirement that is virtually identical to the one now found in Clean Water Act section 313, and further amended the Refuse Act to require private applicants for federal permits or licenses to obtain certifications from states that their proposed activities would also comply with state water quality standards.[3] *See* 33 U.S.C. §1323.

When Congress enacted these provisions in 1970, there was no comprehensive federal regulation of water quality. *Envtl. Prot. Agency v. California ex rel State Water Res. Control Bd.*, 426 U.S. 200, 202-03 (1976). Instead, water quality regulation relied primarily upon each state's development and enforcement of water quality standards. *Id.* Congress adopted these provisions to ensure that federally owned and licensed facilities would comply with state efforts to regulate water quality. *Id.* at 209, n.19. In fact, the section of the statute was entitled "Cooperation by All Federal Agencies in the Control of Pollution." Pub. L. No. 91-224, § 103, 84 Stat. 91 (1970).

In 1972, when Congress promulgated the Clean Water Act, it made only minor modifications to these provisions. The House Report explains that "Section 401 is substantially section 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the Federal Water Pollution Control Act." H.R. Rep. No. 92-911, at 121 (1972), *reprinted in* 1 Congressional Research Service,

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[3] Pub. L. No. 91-224, § 103 amended section 21(b) of the Refuse Act to provide in part:

> Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . that there is reasonable assurance . . . that such activity will be conducted in a manner which will not violate applicable water quality standards.

A Legislative History of the Water Pollution Control Act Amendments of 1972 (hereinafter "Legislative History") at 808 (1973). "The purpose of the certification mechanism . . . is to assure that Federal licensing or permitting agencies cannot override State water quality requirements." S. Rep. No. 92-414 at 69 (1971), *reprinted in* 2 Legislative History at 1487.

In contrast, Congress adopted section 402, which establishes the NPDES permitting program, for the first time in 1972. Pub. L. No. 92-500, § 2, 86 Stat. 880 (1972). Congress recognized that previous efforts to protect water quality had failed, and concluded that strong national standards and an enforceable permit system were necessary to control pollution from industrial and municipal point sources. *See* H.R. Rep. No. 92-911, *reprinted in* 1 Legislative History at 189; S. Rep. No. 92-414, *reprinted in* 2 Legislative History at 1422-25.

At the same time, however, Congress acknowledged that the NPDES permit system was not intended to address all sources of water pollution. S. Rep. No. 95-370 (1977), *reprinted in* 1977 U.S.C.A.A.N. 4366. In particular, Congress did not intend that NPDES permits regulate land use or the allocation of water. *Pronsolino v. Nastri,* 291 F.3d 1123, 1127 (9th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003); *Gorsuch,* 693 F. 2d at 178-79, n.67. In section 510 of the Act, Congress expressly preserved state control in these areas:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter,

> such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard or standard of performance under this chapter. . .

33 U.S.C. § 1370. Section 510 further provides:

> Except as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Id. at § 1370(2). *See also id.* at §§ 1251(b), (g).

In this way, the 1972 enactment represents Congressional intent to establish a comprehensive water quality regulatory scheme in which section 402's permitting program regulated a subset of activities that might affect water quality. Congress was careful to leave intact and provide an important role in this comprehensive regulatory scheme for state regulation of water allocation, land use and non-point source pollution.

Given the different origins and purposes of sections 401 and 402, as well as their different statutory language, operable terms, such as "discharge," should not necessarily have a common construction. That is particularly true if the result were that activities requiring section 401 certification necessarily would also require a section 402 NPDES permit.

CONCLUSION

For the foregoing reasons, WUWC respectfully requests that the Court not employ a construction of section 401 in its resolution of this case that might hereafter be applied to section 402 of the Act.

Respectfully submitted,

BENJAMIN S. SHARP
Counsel of Record
GUY R. MARTIN
SLOANE ANDERS WILDMAN
AARON C. COURTNEY
KAREN M. MCGAFFEY
PERKINS COIE LLP
607 Fourteenth Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 628-6600

Counsel for Amicus Curiae

November 23, 2005

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

S. D. WARREN CO. *v.* MAINE BOARD OF ENVIRONMENTAL PROTECTION ET AL.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

No. 04–1527. Argued February 21, 2006—Decided May 15, 2006

Petitioner company (Warren) asked the Federal Energy Regulatory Commission (FERC) to renew federal licenses for five of the hydroelectric dams it operates on a Maine river to generate power for its paper mill. Each dam impounds water, which is then run through turbines and returned to the riverbed, passing around a section of the river. Under protest, Warren applied for water quality certifications from respondent Maine Board of Environmental Protection pursuant to §401 of the Clean Water Act, which requires state approval of "any activity" "which may result in any discharge into the [Nation's] navigable waters." FERC licensed the dams subject to compliance with those certifications, which require Warren to maintain a minimum stream flow and to allow passage for certain fish and eels. After losing state administrative appeals, Warren filed suit in a state court, which rejected Warren's claim that its dams do not result in a "discharge" under §401. The State Supreme Judicial Court affirmed.

Held: Because a dam raises a potential for a discharge, §401 is triggered and state certification is required. Pp. 3–15.

(a) The Clean Water Act does not define "discharge," but provides that the term "when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." 33 U. S. C. §1362(16). But "discharge" is presumably broader, else superfluous, and since it is neither defined nor a term of art, it should be construed "in accordance with its ordinary or natural meaning." *FDIC* v. *Meyer*, 510 U. S. 471, 476. When applied to water, discharge commonly means "flowing or issuing out." Webster's New International Dictionary 742. This Court has consistently intended that meaning in prior water cases, including the only case focused on §401, *PUD No. 1 of Jefferson Cty.* v. *Washington Dept. of Ecology*, 511 U. S. 700, in which no one

Syllabus

questioned that the discharge of water from a dam fell within §401's ambit. The Environmental Protection Agency and FERC have also regularly read "discharge" to cover releases from hydroelectric dams. Pp. 3–6.

(b) Warren's three arguments for avoiding this common reading are unavailing. The canon *noscitur a sociis*—"a word is known by the company it keeps," *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 575—does not apply here. Warren claims that since "discharge" is keeping company with "discharge" defined as adding one or more pollutants, see §1362(12), discharge standing alone must also require the addition of something foreign to the water. This argument seems to assume that pairing a broad statutory term with a narrow one shrinks the broad one, but there is no such general usage of language this way. Warren also relies on *South Fla. Water Management Dist.* v. *Miccosukee Tribe*, 541 U. S. 95, but that case is not on point. It addressed §402, not §401, and the two sections are not interchangeable, as they serve different purposes and use different language to reach them. Thus, that something must be added in order to implicate §402 does not explain what suffices for a discharge under §401. Finally, the Clean Water Act's legislative history, if it means anything, goes against Warren's reading of "discharge." Pp. 6–12.

(c) Warren's arguments against reading "discharge" in its common sense also miss the forest for the trees. Congress passed the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U. S. C. §1251(a), the "national goal" being to achieve "water quality [providing] for the protection and propagation of fish . . . and . . . for recreation," §1251(a)(2). To do this, the Act deals with "pollution" generally, see §1251(b), which it defines as "the man-made or man-induced alteration of the [water's] chemical, physical, biological, and radiological integrity," §1362(19). Because the alteration of water quality as thus defined is a risk inherent in limiting river flow and releasing water through turbines, changes in the river's flow, movement, and circulation fall within a State's legitimate legislative business. State certifications under §401 are essential in the scheme to preserve state authority to address the broad range of pollution. Reading §401 to give "discharge" its common and ordinary meaning preserves the state authority apparently intended. Pp. 12–15.

2005 ME 27, 868 A. 2d 210, affirmed.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined, and in which SCALIA, J., joined as to all but Part III–C.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1527

S. D. WARREN COMPANY, PETITIONER *v.* MAINE BOARD OF ENVIRONMENTAL PROTECTION ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

[May 15, 2006]

JUSTICE SOUTER delivered the opinion of the Court.*

The issue in this case is whether operating a dam to produce hydroelectricity "may result in any discharge into the navigable waters" of the United States. If so, a federal license under §401 of the Clean Water Act requires state certification that water protection laws will not be violated. We hold that a dam does raise a potential for a discharge, and state approval is needed.

I

The Presumpscot River runs through southern Maine from Sebago Lake to Casco Bay, and in the course of its 25 miles petitioner, S. D. Warren Company, operates several hydropower dams to generate electricity for its paper mill. Each dam creates a pond, from which water funnels into a "power canal," through turbines, and back to the riverbed, passing around a section of the river just below the impoundment.

It is undisputed that since 1935, Warren has needed a license to operate the dams, currently within the authority

*JUSTICE SCALIA joins all but Part III–C of this opinion.

of the Federal Energy Regulatory Commission (FERC) under the Federal Power Act. 16 U. S. C. §§817(1), 792; see also Public Utility Act of 1935, §210, 49 Stat. 846. FERC grants these licenses for periods up to 50 years, 16 U. S. C. §799, after a review that looks to environmental issues as well as the rising demand for power, §797(e).

Over 30 years ago, Congress enacted a specific provision for licensing an activity that could cause a "discharge" into navigable waters; a license is conditioned on a certification from the State in which the discharge may originate that it will not violate certain water quality standards, including those set by the State's own laws. See Water Quality Improvement Act of 1970, §103, 84 Stat. 108. Today, this requirement can be found in §401 of the Clean Water Act, 86 Stat. 877, codified at 33 U. S. C. §1341: "Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable water[s] shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . ." §1341(a)(1).

> "Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with [§§1311, 1312, 1316, and 1317] and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section."[1] §1341(d).

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[1]The statutes cross-referenced go to effluent limitations and other limitations, 33 U. S. C. §§1311, 1312, standards of performance, §1316, and toxic effluent standards, §1317. As we have explained before, "state water quality standards adopted pursuant to §303 [of the Clean Water Act, 33 U. S. C. §1313,] are among the 'other limitations' with which a State may ensure compliance through the §401 certification process."

In 1999, Warren sought to renew federal licenses for five of its hydroelectric dams. It applied for water quality certifications from the Maine Department of Environmental Protection (the state agency responsible for what have come to be known as "401 state certifications"), but it filed its application under protest, claiming that its dams do not result in any "discharge into" the river triggering application of §401.

The Maine agency issued certifications that required Warren to maintain a minimum stream flow in the bypassed portions of the river and to allow passage for various migratory fish and eels. When FERC eventually licensed the five dams, it did so subject to the Maine conditions, and Warren continued to deny any need of §401 state certification. After appealing unsuccessfully to Maine's administrative appeals tribunal, the Board of Environmental Protection, Warren filed this suit in the State's Cumberland County Superior Court. That court rejected Warren's argument that its dams do not result in discharges, and the Supreme Judicial Court of Maine affirmed. *S. D. Warren Co.* v. *Board of Environmental Protection*, 2005 ME 27, 868 A. 2d 210. We granted certiorari, 546 U. S. ___ (2005), and now affirm as well.

II

The dispute turns on the meaning of the word "discharge," the key to the state certification requirement under §401.[2] The Act has no definition of the term, but provides that "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants."[3] 33 U. S. C. §1362(16). It does

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PUD No. 1 of Jefferson Cty. v. *Washington Dept. of Ecology*, 511 U. S. 700, 713 (1994).

[2]No one disputes that the Presumpscot River is a navigable water of the United States.

[3]The term "pollutant" is defined in the Act to mean "dredged spoil,

define "discharge of a pollutant" and "discharge of pollutants," as meaning "any addition of any pollutant to navigable waters from any point source." §1362(12). But "discharge" presumably is broader, else superfluous, and since it is neither defined in the statute nor a term of art, we are left to construe it "in accordance with its ordinary or natural meaning." *FDIC* v. *Meyer*, 510 U. S. 471, 476 (1994).

When it applies to water, "discharge" commonly means a "flowing or issuing out," Webster's New International Dictionary 742 (2d ed. 1949); see also *ibid.* ("[t]o emit; to give outlet to; to pour forth; as, the Hudson *discharges* its waters into the bay"), and this ordinary sense has consistently been the meaning intended when this Court has used the term in prior water cases. See, *e.g.*, *Marsh* v. *Oregon Natural Resources Council*, 490 U. S. 360, 364 (1989) (describing a dam's "'multiport' structure, which will permit discharge of water from any of five levels"); *Arizona* v. *California*, 373 U. S. 546, 619, n. 25 (1963) (Harlan, J., dissenting in part) (quoting congressional testimony regarding those who "'take . . . water out of the stream which has been discharged from the reservoir'"); *United States* v. *Arizona*, 295 U. S. 174, 181 (1935) ("Parker Dam will intercept waters discharged at Boulder Dam").

In fact, this understanding of the word "discharge" was accepted by all Members of the Court sitting in our only other case focused on §401 of the Clean Water Act, *PUD No. 1 of Jefferson Cty.* v. *Washington Dept. of Ecology*, 511 U. S. 700 (1994). At issue in *PUD No. 1* was the State of Washington's authority to impose minimum stream flow

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solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U. S. C. §1362(6).

rates on a hydroelectric dam, and in posing the question presented, the Court said this:

> "There is no dispute that petitioners were required to obtain a certification from the State pursuant to §401. Petitioners concede that, at a minimum, the project will result in two possible discharges—the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity." *Id.*, at 711.

The *Pud No. 1* petitioners claimed that a state condition imposing a stream flow requirement on discharges of water from a dam exceeded the State's §401 authority to prevent degradation of water quality, but neither the parties nor the Court questioned that the "discharge of water" from the dam was a discharge within the ambit of §401. *Ibid.* And although the Court's opinion made no mention of the dam as adding anything to the water, the majority's use of the phrase "discharge of water" drew no criticism from the dissent, which specifically noted that "[t]he term 'discharge' is not defined in the [Clean Water Act] but its plain and ordinary meaning suggests 'a flowing or issuing out,' or 'something that is emitted.'" *Id.*, at 725 (opinion of THOMAS, J.) (quoting Webster's Ninth New Collegiate Dictionary 360 (1991)).

In resort to common usage under §401, this Court has not been alone, for the Environmental Protection Agency (EPA) and FERC have each regularly read "discharge" as having its plain meaning and thus covering releases from hydroelectric dams. See, *e.g.*, EPA, Water Quality Standards Handbook §7.6.3, p. 7–10 (2d ed. 1994) ("EPA has identified five Federal permits and/or licenses that authorize activities that may result in a discharge to the waters[, including] licenses required for hydroelectric projects issued under the Federal Power Act"); *FPL Energy Maine*

Hydro LLC, 111 FERC ¶61,104, P. 61,505 (2005) (rejecting, in a recent adjudication, the argument that Congress "used the term 'discharge' as nothing more than a shorthand expression for 'discharge of a pollutant or pollutants'").[4] Warren is, of course, entirely correct in cautioning us that because neither the EPA nor FERC has formally settled the definition, or even set out agency reasoning, these expressions of agency understanding do not command deference from this Court. See *Gonzales* v. *Oregon*, 546 U. S. ___, ___ (2006) (slip op., at 11) ("*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved"); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). But even so, the administrative usage of "discharge" in this way confirms our understanding of the everyday sense of the term.

III

Warren makes three principal arguments for reading the term "discharge" differently from the ordinary way. We find none availing.

A

The first involves an interpretive canon we think is out of place here. The canon, *noscitur a sociis*, reminds us

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[4]Warren relies on a document from the EPA as a counterexample of the EPA's position in this regard. See Memorandum from Ann R. Klee, EPA General Counsel et al., to Regional Administrators, regarding "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers" (Aug. 5, 2005), available at http://www.epa.gov/ogc/documents/water_transfers.pdf (as visited Apr. 13, 2006, and available in Clerk of Court's case file). The memorandum does not help Warren, however; it interprets §402 of the Clean Water Act, not §401, and construes the statutory phrase "discharge of a pollutant," which, as explained below, implies a meaning different under the statute from the word "discharge" used alone. The memorandum, in fact, declares that "[i]t does not address any . . . terms under the statute other than 'addition.'" *Id.*, at 18.

that "a word is known by the company it keeps," *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 575 (1995), and is invoked when a string of statutory terms raises the implication that the "words grouped in a list should be given related meaning," *Dole* v. *Steelworkers*, 494 U. S. 26, 36 (1990) (internal quotation marks omitted); see also *Beecham* v. *United States*, 511 U. S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well").

Warren claims that the canon applies to §502(16) of the Clean Water Act, which provides that "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." 33 U. S. C. §1362(16). Warren emphasizes that the "include[d]" terms, pollutant discharges, are themselves defined to require an "addition" of pollutants to water. §1362(12). Since "discharge" pure and simple is keeping company with "discharge" defined as adding one or more pollutants, Warren says "discharge" standing alone must require the addition of something foreign to the water into which the discharge flows. And because the release of water from the dams adds nothing to the river that was not there above the dams, Warren concludes that water flowing out of the turbines cannot be a discharge into the river.[5]

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[5]We note that the Supreme Judicial Court of Maine accepted the assertion that "[a]n 'addition' is the fundamental characteristic of any discharge." 2005 Me 27, ¶11, 868 A. 2d 210, 215. It then held that Warren's dams add to the Presumpscot River because the water "los[es its] status as waters of the United States" when diverted from its natural course, and becomes an addition to the waters of the United States when redeposited into the river. 868 A. 2d, at 216 (emphasis deleted). We disagree that an addition is fundamental to any discharge, nor can we agree that one can denationalize national waters by exerting private control over them. Cf. *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 69 (1913) ("[T]hat the running water in a great navigable stream is capable of private ownership is

The problem with Warren's argument is that it purports to extrapolate a common feature from what amounts to a single item (discharge of a pollutant plus the plural variant involving more than one pollutant). See *Beecham*, *supra*, at 371. The argument seems to assume that pairing a broad statutory term with a narrow one shrinks the broad one, but there is no such general usage; giving one example does not convert express inclusion into restrictive equation, and *noscitur a sociis* is no help absent some sort of gathering with a common feature to extrapolate. It should also go without saying that uncritical use of interpretive rules is especially risky in making sense of a complicated statute like the Clean Water Act, where technical definitions are worked out with great effort in the legislative process. Cf. H. R. Rep. No. 92–911, p. 125 (1972) ("[I]t is extremely important to an understanding of [§402] to know the definition of the various terms used and a careful reading of the definitions . . . is recommended. Of particular significance [are] the words 'discharge of pollutants'").

B

Regardless, Warren says the statute should, and even must, be read its way, on the authority of *South Fla. Water Management Dist.* v. *Miccosukee Tribe*, 541 U. S. 95 (2004). But that case is not on point. *Miccosukee* addressed §402 of the Clean Water Act, not §401, and the two sections are not interchangeable, as they serve different purposes and use different language to reach them. Section 401 recast pre-existing law and was meant to "continu[e] the authority of the State . . . to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State." S. Rep. No. 92–414,

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inconceivable"). Thus, though we affirm the Maine judgment, we do so on different reasoning.

p. 69 (1971). Its terms have a broad reach, requiring state approval any time a federally licensed activity "may" result in a discharge ("discharge" of course being without any qualifiers here), 33 U. S. C. §1341(a)(1), and its object comprehends maintaining state water quality standards, see n. 1, *supra*.

Section 402 has a historical parallel with §401, for the legislative record suggests that it, too, was enacted to consolidate and ease the administration of some predecessor regulatory schemes, see H. R. Rep. No. 92–911, at 124–125. But it contrasts with §401 in its more specific focus. It establishes what Congress called the National Pollutant Discharge Elimination System, requiring a permit for the "discharge of any pollutant" into the navigable waters of the United States, 33 U. S. C. §1342(a). The triggering statutory term here is not the word "discharge" alone, but "discharge of a pollutant," a phrase made narrower by its specific definition requiring an "addition" of a pollutant to the water. §1362(12).

The question in *Miccosukee* was whether a pump between a canal and an impoundment produced a "discharge of a pollutant" within the meaning of §402, see 541 U. S., at 102–103, and the Court accepted the shared view of the parties that if two identified volumes of water are "simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants," *id.*, at 109. *Miccosukee* was thus concerned only with whether an "addition" had been made (phosphorous being the substance in issue) as required by the definition of the phrase "discharge of a pollutant"; it did not matter under §402 whether pumping the water produced a discharge without any addition. In sum, the understanding that something must be added in order to implicate §402 does not explain what suffices for a discharge under §401.[6]

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[6]The fact that the parties in *Miccosukee* conceded that the water

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Warren's third argument for avoiding the common meaning of "discharge" relies on the Act's legislative history, but we think that if the history means anything it actually goes against Warren's position. Warren suggests that the word "includes" in the definition of "discharge" should not be read with any spacious connotation, because the word was simply left on the books inadvertently after a failed attempt to deal specifically with "thermal discharges." As Warren describes it, several Members of Congress recognized that "heat is not as harmful as what most of us view as 'pollutants,' because it dissipates quickly in most bodies of receiving waters," 1 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, p. 273 (1973) (remarks of Cong. Clark), and they pro-

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being pumped was polluted does not transform the Court's analysis from one centered on the word "addition" to one centered on the word "discharge." Before *Miccosukee*, one could have argued that transferring polluted water from a canal to a connected impoundment constituted an "addition." *Miccosukee* is at odds with that construction of the statute, but it says nothing about whether the transfer of polluted water from the canal to the impoundment constitutes a "discharge."

Likewise, we are not persuaded by Warren's claim that the word "into" somehow changes the meaning of the word "discharge" so as to require an addition. See Reply Brief for Petitioner 1–2 ("However one might read the lone word 'discharge' by itself, the complete statutory phrase 'discharge into the navigable waters' entails the introduction of something into the waters"). The force of this argument escapes us, since one can easily refer to water being poured or discharged out of one place into another without implying that an addition of some hitherto unencountered mixture or quality of water is made. Indeed, the preposition "into" was used without connoting an addition in the *Miccosukee* analogy cited by Warren. See 541 U. S., at 110 ("[I]f one takes a ladle of soup from a pot . . . and pours it back into the pot, one has not 'added' soup or anything else to the pot" (internal quotation marks and brackets omitted)).

posed to regulate thermal discharges less stringently than others. They offered an amendment to exclude thermal discharges from the requirements under §402, but they also wanted to ensure that thermal discharges remained within the scope of §401 and so sought to include them expressly in the general provision covering "discharge." See *id.*, at 1069–1070, 1071. The proposed definition read, "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, a discharge of pollutants, and a thermal discharge." *Id.*, at 1071.

Of course, Congress omitted the reference to "thermal discharge," and settled on the definition we have today. See Federal Water Pollution Control Act Amendments of 1972, §502(16), 86 Stat. 887. Warren reasons that once Congress abandoned the special treatment for thermal pollutants, it merely struck the words "thermal discharge" from 33 U. S. C. §1362(16) and carelessly left in the word "includes." Thus, Warren argues, there is no reason to assume that describing "discharge" as including certain acts was meant to extend the reach of §401 beyond acts of the kind specifically mentioned;[7] the terminology of §401 simply reflects a failed effort to narrow the scope of §402.

This is what might be called a lawyer's argument. We will assume that Warren is entirely correct about the impetus behind the failed attempt to rework the scope of pollutant discharge under §402. It is simply speculation, though, to say that the word "includes" was left in the description of a "discharge" by mere inattention, and for reasons given in Part IV of this opinion it is implausible speculation at that. But if we confine our view for a moment strictly to the drafting history, the one thing clear is that if Congress had left "thermal discharge" as an in-

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[7]Warren is hesitant to follow its own logic to completion by simply claiming that §401 covers nothing but what §502(16) mentions, the discharge of a pollutant or pollutants.

cluded subclass of a "discharge" under §502(16), Warren would have a stronger *noscitur a sociis* argument. For a thermal discharge adds something, the pollutant heat, see n. 3, *supra*. Had the list of examples of discharge been lengthened to include thermal discharges, there would have been at least a short series with the common feature of addition. As it stands, however, the only thing the legislative history cited by Warren demonstrates is the congressional rejection of language that would have created a short series of terms with a common implication of an addition.

Warren's theory, moreover, has the unintended consequence of underscoring that Congress probably distinguished the terms "discharge" and "discharge of pollutants" deliberately, in order to use them in separate places and to separate ends. Warren hypothesizes that Congress attempted to tinker with the definition of "discharge" because it wanted to subject thermal discharges to the requirements of §401, but not §402. But this assumption about Congress's motives only confirms the point that when Congress fine-tunes its statutory definitions, it tends to do so with a purpose in mind. See *Bates* v. *United States*, 522 U. S. 23, 29–30 (1997) (if "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted)).

IV

Warren's arguments against reading the word "discharge" in its common sense fail on their own terms. [8]

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[8] Warren briefly makes another argument for disregarding the plain meaning of the word "discharge," relying on §511(c)(2) of the Clean Water Act, 33 U. S. C. §1371(c)(2). This section addresses the intersection of the Act with another statute, the National Environmental Policy

They also miss the forest for the trees.

Congress passed the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U. S. C. §1251(a); see also *PUD No. 1*, 511 U. S., at 714, the "national goal" being to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U. S. C. §1251(a)(2). To do this, the Act does not stop at controlling the "addition of pollutants," but deals with "pollution" generally, see §1251(b), which Congress defined to mean "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." §1362(19).

Act of 1969 (NEPA), 42 U. S. C. §4321 *et seq.* NEPA "imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Department of Transportation* v. *Public Citizen*, 541 U. S. 752, 756–757 (2004). Section 511(c)(2) makes the point that nothing in NEPA authorizes any federal agency "authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant" to review "any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under [§401] of this title." 33 U. S. C. §1371(c)(2). Warren argues that reading §401 to cover discharges generally would preclude duplicative NEPA review of certifications involving pollutant discharges, but allow such review of those involving nonpollutant discharges.

But Warren overlooks the fact that "discharge of a pollutant" is used in §511(c)(2) in the course of identifying the agency, not the activity to be certified. Whether a §401 certification involves an activity that discharges pollutants or one that simply discharges, FERC (as an agency that may be described, always, as one with "author[ity] to license or permit the conduct of any activity which may result in the discharge of a pollutant," *ibid.*) may not review it. Thus, nothing in §511(c)(2) is disturbed by our holding that hydroelectric dams require §401 state certifications. It is still the case that, when a State has issued a certification covering a discharge that adds no pollutant, no federal agency will be deemed to have authority under NEPA to "review" any limitations or the adequacy of the §401 certification.

The alteration of water quality as thus defined is a risk inherent in limiting river flow and releasing water through turbines. Warren itself admits that its dams "can cause changes in the movement, flow, and circulation of a river . . . caus[ing] a river to absorb less oxygen and to be less passable by boaters and fish." Brief for Petitioner 23. And several *amici* alert us to the chemical modification caused by the dams, with "immediate impact on aquatic organisms, which of course rely on dissolved oxygen in water to breathe." Brief for Trout Unlimited et al. as *Amici Curiae* 13; see also, *e.g.*, Brief for National Wildlife Federation et al. as *Amici Curiae* 6 (explaining that when air and water mix in a turbine, nitrogen dissolves in the water and can be potentially lethal to fish). Then there are the findings of the Maine Department of Environmental Protection that led to this appeal:

> "The record in this case demonstrates that Warren's dams have caused long stretches of the natural river bed to be essentially dry and thus unavailable as habitat for indigenous populations of fish and other aquatic organisms; that the dams have blocked the passage of eels and sea-run fish to their natural spawning and nursery waters; that the dams have eliminated the opportunity for fishing in long stretches of river, and that the dams have prevented recreational access to and use of the river." *In re S. D. Warren Co.*, Maine Board of Environmental Protection (2003), in App. to Pet. for Cert. A–49.

Changes in the river like these fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns. See 33 U. S. C. §1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"); §1256(a) (federal funds for state efforts to prevent

pollution); see also §1370 (States may impose standards on the discharge of pollutants that are stricter than federal ones).

State certifications under §401 are essential in the scheme to preserve state authority to address the broad range of pollution, as Senator Muskie explained on the floor when what is now §401 was first proposed:

> "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements." 116 Cong. Rec. 8984 (1970).

These are the very reasons that Congress provided the States with power to enforce "any other appropriate requirement of State law," 33 U. S. C. §1341(d), by imposing conditions on federal licenses for activities that may result in a discharge, *ibid.*

Reading §401 to give "discharge" its common and ordinary meaning preserves the state authority apparently intended. The judgment of the Supreme Judicial Court of Maine is therefore affirmed.

It is so ordered.